

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1611

GEORGE SUMNER, WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,
Petitioner,

vs.

ROBERT MATA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 21, 1979.

OPINION BELOW

The opinion of the Court of Appeals is reported at 611 F.2d 754 and is attached to this petition as Appendix A. The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* is unreported and is attached to this petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 21, 1979. The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* was filed on January 31, 1980. This petition is timely filed within 90 days of the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals contravene the requirements of 28 U.S.C. § 2254(b) and (d):

A. When a state prisoner failed to use an available state remedy—i.e., a procedure for contesting the admissibility of identification testimony offered by the prosecution at trial—but the state appellate court, nevertheless considered the issue on the merits, is the state foreclosed from asserting the doctrine of procedural default in a federal habeas proceeding?

B. Assuming that the state appellate court's action precludes the state from asserting the doctrine of procedural default in the federal habeas proceedings, may the state submit the findings of the state appellate court and assert the presumption of correctness which 28 U.S.C. § 2254(d) gives to factual findings by a state trial court?

C. If the presumption of correctness does not accompany the state appellate court's factual findings, is the state at least entitled to litigate the fairness of the identification process at a special hearing because it was previously denied a hearing by the defendant's tactical decision

at trial not to contest the admissibility of the identification testimony?

2. Did the Court of Appeals apply erroneous standards in evaluating respondent's claim of denial of due process in the use of pretrial identification procedures?

A. Does the availability of a suspect for a physical lineup render the use of photographic identification procedures constitutionally suspect?

B. Did the Court of Appeals apply the correct standard to determine the likelihood of irreparable misidentification?

C. Are the Court of Appeals' *de novo* factual findings supported by the record?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28, United States Code section 2254 provides in pertinent part:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> * * *
>
> "(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent

jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct,

* * *

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

United States Constitution, Amendment XIV, section 1 provides in part:

". . . No State shall deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On July 4, 1973, respondent was sentenced to life imprisonment following his conviction for first degree murder in the Superior Court of California, County of Kern.

On his direct appeal, the California Court of Appeal affirmed the judgment of conviction. A copy of the Court of Appeal's opinion is attached to this petition as Appen-

dix C. No petition for hearing by the California Supreme Court was sought.

In state habeas corpus proceedings, the Superior Court for the County of Marin denied respondent's petition raising the claim in a minute order on April 1, 1977; the Fifth District Court of Appeal summarily denied respondent's petition on August 2, 1977; and the California Supreme Court summarily denied respondent's petition on November 14, 1977.

B. Proceedings in Federal Court

On December 9, 1977, respondent filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of California. On May 23, 1978, the district court filed a judgment and order denying the petition. A copy of the court's opinion is attached to this petition as Appendix D.

The Ninth Circuit filed its opinion on December 21, 1979 (Appendix A). A majority of the panel reversed the murder conviction and ordered the district court, upon remand, to "hold the Petition in abeyance for a period of ninety days, within which time California's prosecutors may, if they so choose, initiate a new trial against [respondent]. . . ." 611 F.2d at 760 (A-12).

A petition for rehearing and suggestion for rehearing *en banc* was filed on January 4, 1980. On January 31, 1980, the Court denied the petition for rehearing, though Judge Sneed would have granted the same, and all three judges rejected the suggestion for *en banc* review (Appendix B).

Our request for recall and stay of the mandate was filed on February 26, 1980, and was denied on March 5, 1980.

C. Statement of the Facts Adduced at Trial

1. The Murder

The murder victim, Leonard Arias, had just arrived at the California Correctional Institution at Tehachapi on October 19, 1972, and was socializing with inmates Rigoberto Almengor and Jay Allen, when a call over the institution's loudspeaker ordered all new arrivals to report to the prison laundry room (RT 372, 584). The three men proceeded to the laundry room and passed respondent and his two co-defendants, Gallegos and Vargas (RT 79, 373, 375, 510, 587, 676, 677). Respondent and his co-defendants approached Arias and began hitting him. Gallegos stabbed Arias and one of the three pulled a knife out of Arias' back (RT 377-379, 587). Inmate Allen attempted to help Arias but one of the three assailants jabbed at him, ripping his jacket (RT 588). Almengor joined the fray, and fought with respondent Mata, who had a knife (RT 380). Allen caught Arias as he fell to the floor and Gallegos and Vargas fled through the dormitory door (RT 383-383, 589).

Robert Loomis, a correctional officer at the prison, heard the fight and when he entered the room, inmate Allen yelled, "a guy has been stuck, get an ambulance." (RT 236). Loomis opened his office door and dialed control for assistance (RT 237).

One and one-half minutes after hearing the fight in dorm 8, inmate Juan Olvera saw Gallegos coming from dorm 6 which was near dorm 8 (RT 512). Gallegos was in a hurry and told Olvera, "If they ask about me, tell them I've been

with you for the last hour" (RT 513). Gallegos had a pair of black leather gloves rolled up in his hand at the time (RT 514). One of the persons who stabbed Arias had gloves on (RT 622).

At approximately 2:00 p.m. on the afternoon of the killing, a search of the institution was conducted (RT 658). A knife was discovered in the trash can of dorm 5 and a jacket with blood on the sleeve was found under bunk number 56 of the dorm (RT 659, 660-661). Respondent Mata resided in bunk number 60 of that dorm (RT 658). Broken grass shears were found on the floor between the door of dorm 8 and the spot where Arias' body had fallen (RT 670). The handle portion of the shears was found on the stairs leading into the dorm (RT 672).

The day following the killing, Albert Mills, a correctional officer at Tehachapi, was contacted by inmate Paul Childress who indicated that he had witnessed the incident (RT 673-674). Childress named Mata and one of his co-defendants as the killers and identified the other co-defendant from a picture (RT 285-288, 676-677). Because Childress feared for his life he was placed in segregation confinement (RT 675, 678). While in segregation, he saw Mata, Vargas, and Gallegos, who had also been so confined (RT 289). Defendant Gallegos asked him if he was "ratting on the thing" but he answered that he wasn't (RT 291).

Carlos Ortega, the chief at Tehachapi of the Mexican Mafia prison gang, testified that Mata and Vargas, also members of the Mafia, contacted him before the killing. Mata told him that the victim was due to arrive at the prison, and that they were ordered "to hit" him (RT 822-

824). The next day, October 19, he, Mata and Gallegos met. Mata and Gallegos urged Ortega "to get down," meaning to arm himself with a knife and stab the intended victim (RT 824). When Mata and Gallegos departed, Vargas approached Ortega. Mata and Gallegos returned and Mata tried to give Ortega a knife. Mata said he had another knife in his belt (RT 830-831). Ortega refused to take the knife, and Vargas called him a "cry baby" (RT 832).

Ortega and Gallegos were among several inmates transferred to another institution after the incident. En route, Gallegos said, "My knife broke when I hit him. We all worked out on it." (RT 830-839).

Joe Escobar testified that he was a member of the Nuestra Familia, a rival group to which the victim Arias belonged (RT 1154). Just before the stabbing took place, Escobar saw respondent and his two co-defendants walking toward dorm 8, where the stabbing took place (RT 1175-1178). Escobar saw Gallegos a short time later; his face was flushed and he appeared excited (RT 1178). That evening Escobar saw Mata, who motioned to him and smiled, indicating that he had "hit" the victim (RT 1183-1184).

The defense was one of denial by all three defendants. Three witnesses testified that respondent was on his own bed playing cards near the time when the stabbing took place (RT 1016, 1106, 1131).

2. The Pretrial Identification Procedures

October 19, 1972

Both Almengor and Allen were questioned on the evening of the incident. Almengor named "Bogus" Pete Nunez as one of the assailants. This name had been provided to

him by other inmates, based upon his description of one of the assailants (RT 399). Almengor identified "Bogus" Pete, and tentatively identified defendant Vargas, and inmates Ramirez and Reymundo from a rollodex of all of the inmates on the "medium side" of the institution (RT 398-400, 711, 734, 914-915). Almengor testified that he selected eight photographs as bearing similarities to the three assailants (RT 401).

Allen was not shown any photographs that evening since he asserted that he could not make any identifications (RT 720).

October 27, 1972

Due to prison disturbances, Almengor and Allen were not contacted again for the purpose of making identifications until October 27, 1972 (RT 725, 927).

At this time, Allen was shown a group of photographs introduced into evidence as Exhibit 23,[1] which included the photographs of Mata, Gallegos, and Vargas. The names of the inmates were co. ealed (RT 720). Allen again made no identifications, and complained that the photographs were too old (RT 720-721).

Almengor was also shown the photographs introduced at trial as Exhibit 23 with the names of the inmates concealed (RT 715). Outside Allen's presence, Almengor again tentatively identified the photo of Vargas (RT 437, 711, 959).

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[1]At this time, we have certified the record to include Exhibits 23 and 24, the two photographic arrays preserved and introduced at trial.

Almengor said that he felt the photographs were too old and that appearances might have changed. He requested up-to-date photographs (RT 716).

Up-to-date photographs were taken of the three defendants and other inmates but none were useable. The three defendants were photographed a second time and these pictures are included among the fifteen photographs comprising Exhibit 24. All these photographs are black and white, are of the same size, have the same quality of "newness", and are of inmates of Mexican descent. The defense asserted that Allen and Almengor saw the defendants being taken out for photographing. Allen testified he was unaware that they were being photographed; Almengor testified that he knew Gallegos was being photographed but was unaware respondent and Vargas were with him (RT 444, 445, 625, 634).

October 30, 1972

On October 30, 1972, Allen and Almengor were shown the group of photographs introduced as Exhibit 24.

First Almengor was shown the photographs with the inmates' names concealed, and he identified all three defendants (RT 722). Then Allen was brought in and, while Almengor stood on the other side of the room, Allen likewise identified Mata, Gallegos, and Vargas as the assailants (RT 722).

REASONS FOR GRANTING THE WRIT

From the standpoint of raw power, a single federal district judge in a habeas corpus proceeding can nullify the product of a state's entire criminal justice system. In re-

sponse to abuses of that awesome power and in the interests of comity between federal and state courts, this Court and Congress over the past two decades created two doctrines which serve to limit unwarranted federal reversals of legitimate state court convictions. One is the rule which bars federal habeas review to a state prisoner who has failed to raise issues in the state courts in accordance with the requirements of state procedure absent a showing of "cause" and prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). The other is the requirement that federal habeas courts defer to state court factual findings rendered after full and fair hearings. *LaVallee v. Delle Rose,* 410 U.S. 690 (1973); 28 U.S.C. § 2254(d).

The district court rejected outright our procedural default argument, and denied habeas relief in some cryptic and conclusory findings without confronting our section 2254 argument. On the other hand, the Ninth Circuit not only failed to acknowledge our 2254 argument but also ignored the conventional function of appellate review. In an opinion which can easily be mistaken for the jury argument by trial counsel, the Ninth Circuit not only set the murder conviction at large but precluded any use at retrial of the testimony of two eyewitnesses to the fatal stabbing.

This Court should grant certiorari to clarify two significant limitations on federal habeas corpus review which have become somewhat muddied. First, a state should not be precluded from asserting the doctrine of procedural default simply because a state appellate court, in disregard of settled appellate procedure, has considered and decided on appeal an issue which the defendant failed to preserve

by objecting at trial. Dictum by this Court in footnote three of *Warden v. Hayden*, 387 U.S. 294, 297 (1967), has led some circuit courts to an opposite conclusion. See, e.g., *United States ex rel. Ross v. Fike*, 534 F.2d 731 (7th Cir. 1976); *Curry v. Wilson*, 405 F.2d 110, 112 (9th Cir. 1969). But even if review on the merits by a state appellate court forgives the failure to use available state remedies, at the least the factual findings by the state appellate court on the issue should be afforded a presumption of correctness when offered in a federal habeas proceeding. See 28 U.S.C. § 2254(d). And at the very least, if the state may not assert the presumption of correctness, it should be afforded the opportunity to litigate the issue at a special hearing, a hearing previously denied it by the defendant's failure to object during his trial.

Moreover, the Ninth Circuit found that since it was not necessary to use pretrial photographic identification procedures—that is, a corporeal lineup was possible—the use of photographic identification procedures was therefore classified as unnecessarily suggestive inasmuch as it triggered the application of a test for determining whether there was a substantial likelihood of irreparable misidentification. The court then adopted a set of factors for determining the likelihood of misidentification from a 1971 district court case, which standard differs significantly from those set forth by this Court in *Neil v. Biggers*, 409 U.S. 188 (1972). Finally, the Court of Appeals' *de novo* factual findings are not supported by the record.

Certiorari should be granted so that this Court can resolve the conflicts among the circuits regarding whether the use of otherwise nonsuggestive photographic identifi-

cation procedures renders such procedures constitutionally suspect in the absence of necessity.

ARGUMENT

I

RESPONDENT'S DEFAULT SHOULD BAR CONSIDERATION OF HIS CLAIM AND AT THE LEAST, THE STATE COURT OF APPEAL'S FINDINGS SHOULD BE ACCORDED A PRESUMPTION OF CORRECTNESS

A. Proceedings in the State Courts

A jury convicted Robert Mata of first degree murder. Respondent did not litigate the admissibility of identification testimony at trial. Rather, trial counsel made a tactical decision to use the identification testimony of two of the eyewitnesses, Rigoberto Almengor and Jay Allen, to attack the credibility of the third eyewitness, Paul Childress, when they testified he was not there, knowing they could then attack Almengor's and Allen's credibility by painting the identifications as resulting from official suggestion.

The California Court of Appeal considered on the merits an argument relating to the admissibility of the identification testimony, notwithstanding respondent's failure to preserve the issue by objecting to the introduction of this evidence in the trial court. The court concluded that the circumstances of the case "indicate the inherent fairness of the procedure, and we find no error in the admission of the identification evidence." C-5. Specifically, the Court of Appeal found that the photographs displayed to the witnesses were available for cross-examination purposes at the trial, that there was no showing of influence by the

investigating officers, that the witnesses had an adequate opportunity to view the crime, and that the descriptions by the witnesses were accurate. (C-4, 5).

Respondent did not seek hearing before the California Supreme Court.

In habeas corpus proceedings, respondent again raised this issue, and for the first time complained that his counsel was incompetent for failing to object to the admission of this identification evidence at trial. The California Superior Court, Court of Appeal, and Supreme Court denied respondent's habeas corpus petitions without opinion.

B. Proceedings in the Federal Courts

1. The United States District Court

The district court failed to discuss or make any findings with respect to our section 2254(d) argument. The court also rejected our argument that respondent's claims were beyond federal review because of his procedural default. The district court proceeded to the merits of respondent's eyewitness identification claim and, based upon the same state court record, denied the petition after stating somewhat cryptically that "petitioner has established that irregularities occurred in the pretrial photographic identification of petitioner by witnesses Almengor and Allen." (D-3). The court concluded that these irregularities did not taint the in-court identifications by the witnesses and further concluded that even if the testimony of Allen was tainted, the positive identification by Childress and the strong identification by Almengor made the error harmless beyond a reasonable doubt. The court also found that re-

spondent's trial counsel was not incompetent for not litigating the identification issue at trial because the claim was "at best arguable, and that any error was harmless beyond a reasonable doubt." (D-3).

2. The Court of Appeals

The Ninth Circuit's opinion not only failed to acknowledge our section 2254(d) argument but also disregarded the limitations inherent in the appellate process. Rather than reviewing the district court's findings, the Ninth Circuit, after reviewing the trial court record, found itself "driven to the conclusion that the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 611 F.2d at 759 (A-11). The court went on to say "Due process of law cannot be predicated on a systematic plan by prison officers to twist a photographic identification procedure in a manner calculated to obtain an identification of one they suspect." *Id.* at 759 (A-11). Moreover, the court concluded that it "cannot hold that the error in allowing these identifications was harmless beyond a reasonable doubt." *Id.* at 759-760 (A-12). Reversing and remanding the case to the district court, the only option the Ninth Circuit offered was one of holding the case in abeyance for a period of 90 days "within which time California's prosecutors may, if they so choose, initiate a new trial against the appellant, a trial in which prosecutorial evidence barred by the federal Constitution will not be introduced." *Id.* at 760 (A-12). Thus, in the Ninth Circuit, respondent prevailed on an issue which his trial counsel, in

a tactical decision, elected not to present to the state trial court.

C. Argument

By virtue of respondent's tactical decision to withhold objection to the identification testimony at trial,[2] and the state Court of Appeal's gratuitous consideration and rejection of his claim on the merits, the federal court system has allowed respondent to slice through a procedural default barrier, and at the same time be shielded from a presumption of correctness of the state court's findings rejecting his claim.

The evils which this Court addressed in *Wainwright v. Sykes,* 433 U.S. 72 (1977) are realized in this case. Respondent has also been permitted to utilize a record where the People had no incentive or opportunity to demonstrate the admissibility of the evidence when the witnesses were available and their recollections fresh, and where the trial judge made no factual findings though he was the only judge who observed the demeanor of the witnesses. *Wainwright v. Sykes, supra* at 89.

To allow the federal courts to reach respondent's claim on the merits is to allow defense counsel to "sandbag" on their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in federal court if their initial gamble did not pay off. *Ibid.*

A finding of procedural default is particularly appropriate in the context of this case. This Court has observed

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[2]California's contemporaneous objection rule is codified in California Evidence Code section 353.

that the due process right involved here protects an evidentiary interest, which has a limited impact on our adversary system.

> " 'It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness—an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart—the 'integrity'—of the adversary process.
>
> "Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.' " *Manson v. Brathwaite,* 432 U.S. 98, 113-114, n. 14 (1977) (citations omitted).

This Court's faith in the fact-finding ability of our juries is also evidenced by the observation in *Simmons* that "the danger that use of the technique may result in convictions based upon misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error." *Simmons v. United States,* 390 U.S. 377, 384 (1968).

This Court reiterated this point in an often-cited passage from *Manson v. Brathwaite,* 432 U.S. 98, 116 (1977):

> "We are content to rely upon the good sense and judgment of American juries, for evidence with some extent of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they can-

> not measure intelligently the weight of identification testimony that has some questionable feature."

In the instant case, the photographs from which the witnesses made their identifications were preserved and introduced at trial. Counsel for respondent and both co-counsel cross-examined prosecution witnesses at length in an effort to reveal the possibility of prejudice and impugn their identification testimony and vigorously argued to the jury that these identifications were tainted. (*See People v. Lawrence*, 4 Cal.3d 273, 278-279, 481 P.2d 212, 93 CaR 204 (1971). Is there any doubt that respondent is being given two bites from the same apple—the right he exercised at trial to use the identification testimony to impeach the eye-witnesses testimony and attack the case against the People, and now the right to complain that despite his failure to object, admission of this testimony violated his due process rights in his federal habeas corpus claim?

Nor should the state Court of Appeal's decision be deemed waiver of this default. This Court's opinion in *Wainwright v. Sykes* explains the motivation for the State Court of Appeal's ruling, made prior to *Wainwright* while the rule of *Fay v. Noia*, 372 U.S. 911 (1963) prevailed:

> "Under the rule of *Fay v. Noia*, state appellate courts know that a federal constitutional issue raised for the first time in the proceeding before them may well be decided in any event by a federal habeas tribunal. Thus, their choice is between addressing the issue notwithstanding the petitioner's failure to timely object, or else face the prospect that the federal habeas corpus court will decide the question without the benefit of their views." *Id.* at 89.

Thus, the state court's ruling on the merits should not be considered a waiver of respondent's procedural default.

If it is determined that the state appellate court forgave the default by reaching the merits, surely its resolution of the facts is entitled to the presumption of correctness accorded state court findings by 2254(d). To rule otherwise would be to reward respondent's tactically motivated noncompliance with the contemporaneous objection rule. *Wainwright v. Sykes, supra* at 90.

The Ninth Circuit disregards the federal rules by not according the state's factual findings a presumption of correctness, yet making its own factual findings on the same "cold" state record. At the very least, if a "cold" record cannot serve as a basis for a presumption of correctness, the state should be given the opportunity to present evidence on this issue in an evidentiary hearing before *de novo* factual findings are made by any federal court.

II

THE AVAILABILITY OF A SUSPECT FOR A PHYSICAL LINEUP DOES NOT RENDER THE USE OF A PHOTOGRAPHIC LINEUP CONSTITUTIONALLY SUSPECT. MOREOVER, THE STANDARD WHICH THE COURT OF APPEALS USED TO DETERMINE THE LIKELIHOOD OF MISIDENTIFICATION IS ERRONEOUS

The Ninth Circuit's opinion purported to follow *Simmons v. United States,* 390 U.S. 377 (1968) and *Neil v. Biggers,* 409 U.S. 188 (1972), which hold that a conviction based on eyewitness identification at trial following a pre-

trial identification by photograph will be set aside as a denial of due process only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. See 611 F.2d at 757 (A-6, 7).

The opinion, however, describes and follows a "two-part approach" which the Ninth Circuit has independently developed in determining the admissibility of an in-court identification. The court identifies and applies the first part of this approach by stating:

> "First, the *necessity* of the photographic identification procedure is considered. In this case, appellant was an inmate at the Tehachapi facility and was placed in segration after the stabbing. It seems quite clear, therefore, that there was no necessity here to use photographic identification procedures. While lack of necessity is not a *per se* ground for rejection of the identification, we have consistently held that necessity is an important factor to be considered in judging the validity of the identification procedures." *Id.* at 757 (citations omitted) (A-7).
>
> "The second standard or tier of our court's traditional approach is 'whether there was a very substantial likelihood of irreparable misidentification'." *Id.* at 758 (A-7, 8).

Applying this test the court concludes that:

> "Based upon the lack of necessity, the diversion of the witnesses' attention at the time the crime was committed, the hazy and very general description of the appellant by Almengor, and the inescapable focusing of attention upon the appellant by the investigating authorities, we are driven to the conclusion that the photographic identification procedure was so

> impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 759 (footnote omitted) (A-11).

We submit that the test articulated by the Ninth Circuit departs radically from the holdings of this Court. Despite the fact that this Court has stressed that reliability is the "linchpin" in determining the admissibility of identification evidence following pretrial identification confrontations, the Ninth Circuit's test introduces factors which have no possible bearing on the reliability of that evidence. Furthermore, the Ninth Circuit's test conflicts with the interpretation of this Court's holdings which have generally been reached by the other circuits and by the state courts. Since the Ninth Circuit's articulation of this test appears to be considered pronouncement, based on a line of previous Ninth Circuit cases, its opinion in this case cannot be classified as an aberrant decision which is unlikely to influence the results of other cases.[3]

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[3]The case appears to be part of a significant line of cases decided by the Ninth Circuit in which its "two-part approach" has been used to resolve questions regarding the admissibility of identification evidence following pretrial identification confrontations in a variety of factual contexts. *United States v. Calhoun*, 542 F.2d 1094, 1104 (9th Cir. 1976), *cert. denied*, 429 U.S. 1064; *United States v. Valdivia*, 492 F.2d 199, 209-210 (9th Cir. 1973), *cert. denied*, 414 U.S. 801 and 416 U.S. 940; *United States v. Baxter*, 492 F.2d 150, 170-173 (9th Cir. 1973), *cert. denied*, 414 U.S. 801 and 416 U.S. 940; *McNeary v. Stone*, 482 F.2d 804 (9th Cir. 1973), *cert. denied*, 414 U.S. 1071; *United States v. Bennett*, 445 F.2d 638 (9th Cir. 1971), *cert. denied*, 404 U.S. 1023; *see also United States v. Crawford*, 576 F.2d 794, 797 (9th Cir. 1978).

A. There Is No Requirement That Necessity Must Be Shown Before a State May Use a Photographic Array for Pretrial Identification Purposes

This Court's cases do not require that "necessity" must be demonstrated before photo identification procedures may be used. It is true that in *Stovall v. Denno,* 388 U.S. 293 (1967), a case involving a show-up of a single handcuffed suspect (a practice which the Court noted had been "widely condemned"), the Court stated that a claimed violation of due process in the conduct of a confrontation depends on the totality of circumstances surrounding it and, in finding that there had not been a violation of due process, stressed that under the circumstances there was no practical alternative to a single-person show-up. *Id.* at 302. *Stovall* does not hold that lack of "necessity" for use of a particular identification procedure (especially one that may not, in itself, be impermissibly suggestive) weighed in favor of a finding that the suspect's due process rights had been violated.

In *Simmons v. United States, supra,* 390 U.S. 377, the first case in this Court dealing with photo identifications, the Court noted that, "this procedure has been used widely and effectively in criminal law enforcement." *Id.* at 384. It then held that: ". . . [C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* In applying this test to the case before it, the Court noted that it had not been suggested that it was "unnecessary" to use photo

identification procedures. Use of such procedures was justified by the fact that the suspects were still at large when their pictures were shown to the witnesses and it was essential for the FBI swiftly to determine whether they were on the right track. *Id.* at 384-385. The Court then noted that in the circumstances of this case there was "little chance that the procedure utilized led to misidentification of *Simmons*." *Id.* at 385. This case does *not* hold that lack of "necessity" for use of photographic identification procedures weighs in favor of a finding that the suspect's due process rights have been violated.

The meaning of *Stovall* and *Simmons* became clearer in the Court's subsequent cases. In *Neil v. Biggers, supra,* 409 U.S. 188, a case involving an identification at a single-person show-up, the Court reviewed its previous cases and stated the principle to be extracted from them: "It is the likelihood of misidentification which violates a defendant's right to due process. . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Id.* at 198. The Court then stated: "What is less clear from our cases is whether . . . unnecessary suggestiveness alone requires the exclusion of evidence. While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to respondent [in order to construct a lineup], we do not think that the evidence must therefore be excluded." *Id.* at 198-199 (footnote omitted).

The Court then turned to the "central question" of "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Id.* at 199. It stated that: ". . . [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199-200.

Applying these factors to the case before it, the Court found that the identification was reliable and that the district court, which reached the opposite conclusion, "focused unduly on the relative reliability of a lineup as opposed to a show-up." *Id.* at 200.

In *Manson v. Brathwaite, supra,* 432 U.S. 98, a case involving identification by means of a single photograph shown to a witness, the court stated that the admission of evidence concerning a suggestive and unnecessary pretrial identification procedure does not violate due process as long as the identification possesses sufficient aspects of reliability. The Court applied a two-part approach in determining whether the suspect's due process rights were violated. The initial inquiry was whether the out-of-court identification was obtained by use of an impermissibly suggestive procedure. If it was, the Court then asked whether, under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentifi-

cation. *Id.* at 107. If it did not, evidence of the out-of-court identification could still be admitted. The Court stressed that: ". . . [R]eliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations. The factors to be considered are set out in *Biggers*. . . . Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Id.* at 114.

It is *Manson* which most dramatically underscores the error in the Ninth Circuit's approach. The Ninth Circuit equates lack of "necessity" for the use of photographic identification procedures with impermissible suggestiveness and requires a court to proceed directly from a finding of lack of "necessity" to application of criteria for determining whether identification possessed sufficient aspects of reliability. The lack of "necessity" is given weight among these factors as tending to detract from the reliability of the identification. 611 F.2d at 757, 759 (A-6, 7, 11).

The Ninth Circuit's approach is contrary to numerous cases decided by the other circuits. For example, in *United States v. Marchand,* 564 F.2d 983, 995 (2nd Cir. 1977), *cert. denied,* 434 U.S. 1015, the court stated: "While it is preferable for law enforcement officers to use a line-up rather than photographic identification when the suspect is available, this is not a requirement." To the same effect are *United States ex rel. Pella v. Reid,* 527 F.2d 380 (2nd Cir. 1979); *United States v. Boston,* 508 F.2d 1171, 1176-1177 (2nd Cir. 1974), *cert. denied,* 421 U.S. 1001; and *United States v. Hurt,* 476 F.2d 1164 (D.C. Cir. 1973). In *United States v. Evans,* 484 F.2d 1178, 1186 fn. 8 (2nd Cir. 1973), the court specifically rejected a contention that

"taint" is established prima facie when the government has failed to use a "more reliable source of identification" when it is able to do so.

In *United States v. Gidley*, 527 F.2d 1345 (5th Cir. 1976), rehearing denied 530 F.2d 976, *cert. denied*, 429 U.S. 841, a case in which witnesses were showed a photo spread approximately two weeks before trial, the court states that: "In determining whether the photographic display was impermissibly suggestive, we evaluate only the picture spread itself—whether other more desirable methods of identification were available or whether there was a compelling need for a photographic display are not relevant in the determination." *Id.* at 1350.

Gidley has been consistently followed in the Fifth Circuit. The most recent cases following it are *Frank v. Blackburn*, 605 F.2d 910 (5th Cir. 1979) (rehearing *en banc* granted) and *Hudson v. Blackburn*, 601 F.2d 785 (5th Cir. 1979).

The Ninth Circuit's approach is also contrary to the great weight of the state court cases. The ALI Model Code of Pre-arraignment Procedure (1975) does not prohibit or restrict the use of photo identification procedures to situations where photo identification (as opposed to a corporeal lineup) is "necessary." The comments to section 160.2 of the Model Code (dealing with the conduct of identification procedures) note that, "most courts recognize no ban on photo identification when the defendant is in custody and a lineup is feasible." *Id.* at 440.

This position is in accord with this Court's general statement in *United States v. Ash*, 413 U.S. 300, 321 (1973):

"We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required."

The Ninth Circuit's standard conflicts with the standard adopted by this Court, by the other circuits, and by most of the states which have considered the issue. Despite the fact that this Court has repeatedly stressed that reliability is the keynote in determining the admissibility of identification evidence, the Ninth Circuit's standard identifies as an "important factor" a circumstance (the "necessity" for the use of photo identification procedures as opposed to corporeal lineup procedures) which has nothing to do with either suggestiveness or reliability. No due process interest of the defendant and no interest of society are protected by the Ninth Circuit's unique rule.

The issue presented by this case is not whether corporeal lineups should generally be used in place of photographic identification procedures when it is feasible to do so. Rather, the issue is whether the due process clause, as applied to the states, requires that corporeal lineups be used by equating failure to use them in the first instance with a finding that the other procedures actually used were impermissibly suggestive, and by giving this "finding" significant weight as detracting from the reliability (and hence admissibility) of identification evidence. As the court stated in *United States v. Evans, supra,* 484 F.2d at 1184, ". . . [T]o sustain the exclusion of identification testimony, there had to be a showing both of impermissibly suggestive procedures *and* of the substantial likelihood of misidentification. Where one or both are lacking, this Court concluded that eyewitness identification testimony was to be admitted."

B. The Standard Which the Court of Appeals Uses to Determine the Likelihood of Irreparable Misidentification Is Erroneous and Its Factual Findings Without Support in the Record

Having determined that lack of necessity results in a constitutionally suspect identification procedure, the Court of Appeals turned to a determination of whether there was a very substantial likelihood of misidentification. The Court adopts its criteria for making this determination from *Parker v. Swenson*, 332 F.Supp. 1225, 1230-1231 (E.D. Mo. 1971), a pre-*Biggers*, pre-*Manson* district court decision:

> "'(1) the length of time and the conditions under which a witness was able to observe the perpetrator during the commission of the crime . . . , (2) the similarity of the description given by a witness immediately after the crime to the physical characteristics of the individual he subsequently identifies, (3) conduct on the part of the police tending to focus attention on a particular subject, and (4) presence of other witnesses at the time of the improper identification and the possible prejudicial influence of one witness' opinion on another's recollection. *See Parker v. Swenson*, 332 F.Supp. 1225, 1230-1231 (E.D. Mo. 1971)." 611 F.2d at 758 (A-8).[4]

Compare and contrast this set of factors with this Court's test set forth in *Neil v. Biggers, supra*, 409 U.S. at 199-200, and used in *Manson v. Brathwaite, supra*, 432 U.S. at 114-115.

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[4]This standard, an apparent favorite of the Ninth Circuit, has also been used by the Court in *United States v. Valdiva, supra*, at 210; *United States v. Calhoun, supra* at 1104; and *United States v. Crawford, supra* at 797.

"1. The opportunity to view.

2. The degree of attention.

3. The accuracy of the description.

4. The witness' level of certainty.

5. The time between the crime and the confrontation."

The Court of Appeals' test is fatally defective in that under its factors (3) and (4) are included the very elements of suggestiveness which are supposed to be placed to one side in order to evaluate the independent basis for the identification. It also fails to consider two of the five factors set forth by this Court: the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

The Court's errors in establishing the standards to evaluate respondent's constitutional claim are compounded by its application of its own *de novo* factual findings which are not supported by the record. We will highlight some of the more critical factual determinations.

The necessity determination was resolved in two sentences:

> "In this case, appellant was an inmate at the Tehachapi facility and was placed in segregation after the stabbing. It seems quite clear, therefore, that there was no necessity here to use photographic identification procedures." 611 F.2d at 757 (A-7).

It does not follow that because prison officials had respondent segregated that a corporeal lineup was feasible. The difficulty was clearly not obtaining custody of him;

rather, it concerned arranging large groups of inmates, including the suspects, for identification by the witnesses.

Respondent's candid concession for the necessity of the photographic display at oral argument before the Ninth Circuit was based on the fact that this contract killing by the Mexican Mafia against a Nuestra Familia member prompted riots and the necessity to lock down the prison.

The majority's simplistic approach would mandate prison officials to line up large numbers of inmates of Mexican descent, some of whom no doubt would have connections with these prison gangs, with the expectation that in this face-to-face confrontation the witnesses would make an identification.[5]

Judge Sneed's dissent aptly acknowledges that "The prison world is unique. It differs enormously even from the precinct stationhouse and police headquarters. A 'code of silence' strengthened by taboos against 'ratting' and a pervasive fear of retaliation are characteristics of the social order. In this environment, prison administrators and guards must function. Administrators are responsible for protecting prisoners in their custody and may be held liable for a failure to provide such protection." 611 F.2d at 760 (citations omitted) (A-14).

In evaluating the likelihood of irreparable misidentification, the Court acknowledges, as it must, that the witnesses observed the stabbing and actually fought with respondent and one of his co-defendants. To repudiate

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[5]The Ninth Circuit opinion presupposes the existence of facilities at Tehachapi enabling a witness to view a lineup without having those in the lineup view the witness; in fact, no such facilities exist there.

this fact, the Court found "the violence accompanying the incident and the threat presented by the knife would have, quite likely, diverted the witnesses' attention." 611 F.2d at 758 (A-9). No empirical evidence demonstrating why this is "quite likely" is offered. Moreover, the conclusion is clearly erroneous in light of the testimony of Almengor that he and Mata made eye contact (RT 379-383). Thus, as in *Neil v. Biggers, supra* at 200, these witnesses were not "'casual observers" but were victims, as well, of the assault.

The only other appropriate factor considered by the Court, the accuracy of the description, also contains factual misrepresentations.

The majority acknowledged that Almengor told the investigating authorities that "two of the assailants were dark-complexioned and wore moustaches, while the other assailant looked like 'an Indian dude'. The appellant is of Mexican descent and wore a moustache at the time of the homicide." 611 F.2d at 758 (A-9). The Court concluded that this was "clearly not detailed" and compared the description in *Neil v. Biggers,* which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, and which this Court described as "more than ordinarily thorough." *Ibid.* Yet, the record contains more detail including a description of the types of moustaches ("a small moustache, more or less like mine" and "the one who was doing the stabbing, he had a thicker moustache"), and that this assailant had "sort of longer hair like coming up to his neck collar and twisting up." (RT 970). The clothing worn by the three was also described: they wore state issue jackets, gloves, and beanie

caps (RT 969-970). Their identification as being of Mexican descent is implicit in Almengor's request on October 19 to be shown pictures of "all the Mexican population on that side [the medium side] of the fence." (RT 397). Finally, inmate Allen testified that he knew Mata prior to this incident since at one time, they both lived in the same dorm. (RT 595).

To conclude, not only did the Ninth Circuit use an erroneous legal standard but its *de novo* factual findings are not supported by record.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: April 3, 1980

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(Appendices follow)

Appendices

Appendix A

No. 78-2636.

United States Court of Appeals,
Ninth Circuit.

Robert MATA,
Petitioner-Appellant,

vs.

George SUMNER,
Respondent-Appellee.

Dec. 21, 1979.

Rehearing Denied Jan. 31, 1980.

Before: ELY and SNEED, Circuit Judges,
and TAKASUGI,* District Judge.

ELY, Circuit Judge:

Robert Mata ("appellant") appeals from the District Court's denial of his Petition for Writ of Habeas Corpus. The Petition followed the appellant's conviction of murder in a California state court and his exhaustion of all available state court remedies.

We reverse the District Court's Order upon the basis of our conclusion that state authorities violated rights given to the appellant by the federal Constitution. First, the pre-trial photographic identification procedure em-

*The Honorable Robert M. Takasugi, United States District Judge for the Central District of California, sitting by designation.

ployed by state police was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable in-court misidentification of the appellant. Second, the admission of the in-court identification constituted error of constitutional dimension.

FACTS

This case involved a homicide at the medium security prison, C.C.I., Tehachapi, California, on October 19, 1972. The prosecution's case was based chiefly on the theory that the homicide was a result of feuding between opposing prison factions—the "Mexican Mafia" and the "Nuestra Family." The homicide victim, Leonard Arias, was represented to have been a member of the "Nuestra Family." Prior to being transferred to Tehachapi, Arias had allegedly attacked a member of the "Mexican Mafia" while at another California prison, San Quentin. As a result of this attack, the "Mexican Mafia" had a "contract" out on the life of Arias. The day after his arrival at Tehachapi, Arias was fatally stabbed.

The prosecution alleged that the appellant and co-defendants Gallegos and Vargas approached Arias and began hitting him. Gallegos stabbed Arias, and one of the three defendants pulled the knife out of Arias' back. One witness, Allen attempted to help Arias, but one of the three defendants jabbed at him, ripping his jacket. Another witness, Almengor, allegedly fought with the appellant, who had a knife.

The facts surrounding the pre-trial photographic identification procedures are set forth below:

October 19, 1972

Almengor was shown several hundred photographs of inmates. He selected eight photographs, making a positive identification of Pete Nunez as the person who did the stabbing, and tentatively identifying inmates Ramirez, Reymundo, and Vargas. He did not identify the appellant as a participant. Almengor changed his "positive" identification of Nunez when prison authorities told him that Nunez had been outside the prison on the day of the killing.

Allen was not shown any photographs on October 19th, since he asserted that he could not make any identification.

October 27, 1972

Almengor and Allen were shown twenty-four photographs of inmates, including photographs of the three defendants. Outside of Allen's presence, Almengor again tentatively identified the photograph of Vargas. Once again, however, Almengor did not identify the appellant. Moreover, Almengor stated that the photographs were too old and requested more recent ones. Allen was unable to make any identification, and he also complained that the photographs were too old.

October 27-October 30, 1972

A series of updated photographs were taken of the defendants and other inmates, but none of the photographs were useable. The photographs of the three defendants were the only ones taken a second time. The defense asserted that when the defendants were taken to be photographed, they were led out of the segregation unit in partial view of Almengor and Allen. It is disputed whether

Almengor or Allen actually recognized the defendants as the persons who were to be photographed.

October 30, 1972

Almengor and Allen were shown fifteen photographs of inmates. The only updated photographs included were those of the three defendants. Not included in the group of fifteen were the photographs of Ramirez, Reymundo, and Nunez. As indicated, Almengor had previously identified these men as suspects when he had been shown photographs on October 19th. The prosecution's position was that the exclusion occurred because the correctional officers did not consider these inmates as suspects.

In an interview on October 27, 1972, Almengor had described two of the assailants as having mustaches. Six of the fifteen photographs were of inmates wearing mustaches and prison dress. Three of the six photographs were the updated photographs of the three defendants, while the other three photographs were less than a year old. Although taken at different times, most of the photographs in the line-up were similar in terms of size, color, and pose. All of the inmates pictured were of Mexican descent. From these fifteen photographs, Almengor selected those of the three defendants. As indicated above, Almengor had never, prior to this time, identified the appellant. Allen was then brought in, and while Almengor stood on the other side of the room, Allen likewise identified the three defendants. This was the first time that Allen had made an identification of any of the assailants.

The appellant asserted that Almengor was informed by prison officials that he was a suspect because of the dis-

covery, shortly after the murder, of bloodied clothes that belonged to him. Further, it is not disputed that Almengor had asserted throughout much of the identification process that he could not make a positive identification from photographs. The prosecution conceded that Almengor requested a line-up and that this request was refused. No reason for the refusal was given.

In respect to Allen, appellant pointed to the fact that Allen originally stated that he could make no identification. Appellant also asserted that the California Department of Corrections "reminded" Allen of his upcoming parole date and threatened to transfer him, if he failed to cooperate, to another institution, a facility wherein his life would be in danger. Finally, appellant asserted that Allen told one Faulkner, a private investigator for the appellant, that (1) the incident lasted only a few seconds, and Allen did not get a good enough look at any of the assailants to identify them; (2) throughout the investigation Allen had maintained that he could not identify the assailants, and that he would take a lie detector test to substantiate this; (3) Allen assumed the three defendants must have been the ones who committed the murder because he saw them being taken to be photographed the second time; (4) Allen was due for parole and was under pressure from the Department of Corrections to make an identification.

The prosecution contended that the appearance of the appellant in the updated photograph was significantly different than the original photograph which had been taken three to eight months earlier. Furthermore, the prosecution relied upon Allen's testimony that he had feigned an

inability to make an identification because he was attempting to avoid involvement. In addition, the prosecution contended that Allen denied that correctional officers attempted to influence him and repudiated much of what Private Investigator Faulkner had testified that Allen had told him earlier. Finally, the prosecution pointed to evidence that Allen and Almengor did not ascertain the identity of who was being photographed a second time and thus did not "correctly select" the defendants on this basis.

DISCUSSION

I.

The presence of counsel is not constitutionally required during a pre-trial photographic display for purposes of suspect identification. *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973). Such identification, however, may be challenged as violative of due process when the procedure is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall v. Denno*, 388 U.S. 293, 301-02, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) The validity of a photographic identification is to be evaluated in light of the particular facts and surrounding circumstances of each case. *Simmons v. United States,* 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *United States v. Calhoun*, 542 F.2d 1094, 1104 (9th Cir. 1976), *cert. denied*, 429 U.S. 1064, 97 S.Ct. 792, 50 L.Ed.2d 781 (1977). A conviction "based on eyewitness identification at trial following a pretrial identification by photograph will be set aside . . . [as a denial of due process] only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substan-

tial likelihood of irreparable misidentification." *Simmons v. United States, supra*, 390 U.S. at 384, 88 S.Ct. at 971.

Our Circuit has generally followed a two-part approach in determining the admissibility of an in-court identification. *See, e.g., United States v. Valdivia*, 492 F.2d 199, 210 (9th Cir. 1973), *cert. denied*, 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974); *United States v. Crawford*, 576 F.2d 794, 797 (9th Cir.), *cert. denied*, 439 U.S. 851, 99 S.Ct. 157, 58 L.Ed.2d 155 (1978). First, the *necessity* of the photographic identification procedure is considered. *Id.* In this case, appellant was an inmate at the Tehachapi facility and was placed in segregation after the stabbing. It seems quite clear, therefore, that there was no necessity here to use photographic identification procedures. While lack of necessity is not a *per se* ground for rejection of the identification, *see United States v. Calhoun, supra*, 542 F.2d at 1104; *United States v. Valdivia, supra*, 492 F.2d. at 210, we have consistently held that necessity is an important factor to be considered in judging the validity of the identification procedures. *See United States v. Peele*, 574 F.2d 489, 490 (9th Cir. 1978); *United States v. Calhoun, supra*, 542 F.2d at 1104; *United States v. Pheaster*, 544 F.2d 353, 370 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099, 97 S.Ct. 1118, 51 L.Ed.2d 546 (1977); *United States v. Valdivia, supra*, 492 F.2d at 210; *United States v. Baxter*, 492 F.2d 150, 171 (9th Cir. 1973), *cert. denied*, 414 U.S. 801, 94 S.Ct. 16, 38 L.Ed.2d 38 (1974).

The second standard or tier of our court's traditional approach is "whether there was a very substantial likelihood of irreparable misidentification." *United States v.*

Valdivia, supra, 492 F.2d at 210. Unnecessary suggestibility alone does not require exclusion of the subsequent indentification. *Manson v. Brathwaite,* 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). "It is the likelihood of misidentification which violates a defendant's right to due process . . .." *Neil v. Biggers,* 409 U.S. 188, 198, 93 S.Ct. 375, 381-382, 34 L.Ed.2d 401 (1972). In other terms, "the focus is on the reliability of the witnesses' identification rather than on the flaws in the pretrial identification procedures." *United States v. Barron,* 575 F.2d 752, 754 (9th Cir. 1978). Several factors have been listed as relevant in the evaluation of the likelihood of misidentification:

> (1) the length of time and the conditions under which a witness was able to observe the perpetrator during the commission of the crime . . ., (2) the similarity of the description given by a witness immediately after the crime to the physical characteristics of the individual he subsequently identifies, (3) conduct on the part of the police tending to focus attention on a particular subject, and (4) presence of other witnesses at the time of the improper identification and the possible prejudicial influence of one witness' opinion on another's recollection. See *Parker v. Swenson,* 332 F.Supp. 1225, 1230-1231 (E.D.Mo.1971).

United States v. Valdivia, supra, 492 F.2d at 210. *See also United States v. Calhoun, supra,* 542 F.2d at 1104; *United States v. Crawford, supra,* 576 F.2d at 797.

In applying the facts of this case to well established standards, it is obvious that there was a grave likelihood of irreparable misidentification.

According to their testimony, witnesses Almengor and Allen observed the stabbing and actually fought with appellant and one of the co-defendants. This would have at least provided an opportunity for the witnesses to observe the perpetrators of the crime. On the other hand, the violence accompanying the incident and the threat presented by the knife would have, quite likely, diverted the witnesses' attention.

On October 27, 1972, Almengor told investigating authorities that two of the assailants were dark complexioned and wore moustaches, while the other assailant looked like "an Indian dude." The appellant is of Mexican descent and wore a moustache at the time of the homicide.

Yet, the descriptions of the assailants were clearly not detailed descriptions. *Cf. Neil v. Biggers, supra,* 409 U.S. at 200, 93 S.Ct. 375 (description included assailant's approximate age, height, weight, complexion, skin texture, build, and voice).

As for conduct on the part of the authorities "tending to focus attention on a particular subject," it should first be noted that there was not one, but three different sessions wherein Almengor and Allen were shown photographs. As stated in *United States v. Higginbotham,* 539 F.2d 17, 23 (9th Cir. 1976), wherein the witness was given a photographic display twice:

> While the repeated showing to a witness of photographic displays for the purpose of identification presents opportunities for abuse and due process problems, when it is shown that the witness was equivocal on the first selection and became firm on a later

showing, that rule should not be applied where the witness has been consistently firm.

See also United States v. Cook, 608 F.2d 1175 at 1178-79 (9th Cir. June 29, 1979) ("As with all photographic identification procedures, there is a possibility that the prior photo array tainted this later identification.").

Here, Almengor was not merely "equivocal" on the first selection. He selected photos of three individuals whom the prosecution asserts were not involved at all. Allen would not even look at the photos because he said he could not make an identification. The two witnesses made the "correct" selections on the third time around, and only after (1) Almengor's request for a line-up had been refused.[1] (2) considerable pressure from both the prison officers and opposing prison factions had admittely been brought to bear on both witnesses, (3) prior "mistaken" selections had been removed, (4) the number of photos had been drastically reduced; and (5) new photos of appellant and co-defendants (and only of these three) had been substituted in the array.[2]

The prosecution argued that the changed appearance of the appellant in the updated photograph accounted for the

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[1]As indicated above, the state authorities offered no reason why Almengor's request for a line-up was denied. Particularly in light of the witnesses' own complaints about the photographic identification procedure, we can only infer that the refusal stemmed from the reluctance of the prison officials to provide appellant with the assistance of counsel which would be required in a line-up procedure.

[2]*Cf. Simmons v. United States, supra,* 390 U.S. at 383, 88 S.Ct. at 971 (The danger of an erroneous identification by a witness "will be increased if the police . . . show [the witness] the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.").

sudden ability of Almengor and Allen positively to identify the appellant on October 30th. While we have looked at the photographic exhibits and do agree that there is some change in appearance, this fact must be balanced against the totality of circumstances. Based upon the lack of necessity, the diversion of the witnesses' attention at the time the crime was committed, the hazy and very general description of the appellant by Almengor, and the inescapable focusing of attention upon the appellant by the investigating authorities, we are driven to the conclusion that the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Due process of law cannot be predicated on a systematic plan by prison officers to twist a photographic identification procedure in a manner calculated to obtain an identification of one they suspect.[3]

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[3]Having carefully considered the dissenting opinion, the majority deems it unnecessary to comment on that opinion, except for one portion thereof. The portion reads:

> "Pressure was indispensable in the circumstances of this case if the crime was to be solved reasonably quickly. I repeat, prison officials must operate in a humane manner but also in a fashion that takes into account the realities of prison environment. The officials in this case, in my opinion, merely did what we as citizens demand of them, *i. e.*, protect the inmates by apprehending those who recently had preyed upon one of them."

The record before us indicates, with unmistakable clarity, that the photographic identification procedures in question were *not* employed to "protect the inmates by apprehending those who recently had preyed upon one of them." In fact, the appellant had already been quickly apprehended and placed in segregation after the stabbing had occurred. Therefore, the impermissible procedures were utilized so as to assemble incriminating evidence against the appellant in order that the crime be more quickly "solved."

In the consideration of such a fundamental right as due process, there are, of course, much more treasured values than mere speed and efficiency. *See Wolff v. McDonnell*, 418 U.S. 539, 583, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (Marshall, J., dissenting); *Fuentes v.*

II.

From our review of the record, including the evidence introduced against the appellant, it is clear to us that the in-court identifications by Almengor and Allen constituted evidence that was of exceptional importance to the prosecution in its achievement of the appellant's conviction. Therefore, we cannot hold that the error in allowing these identifications was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *United States v. Lopez,* 575 F.2d 681, 685 (9th Cir. 1978). *See also Wilson v. Anderson,* 379 F.2d 330, 335-37 (9th Cir. 1967) (Ely, J., dissenting), *rev'd per curiam, Anderson v. Nelson,* 390 U.S. 523, 88 S.Ct. 1133, 20 L.Ed.2d 81 (1968). Accordingly, the challenged Order of the District Court is reversed. Upon remand, the District Court will hold the Petition in abeyance for a period of ninety days, within which time California's prosecutors may, if they so choose, initiate a new trial against the appellant, a trial in which prosecutorial evidence barred by the federal Constitution will not be introduced.

REVERSED and REMANDED, with directions.

Shevin, 407 U.S. 67, 90-91 n. 22, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1977). We cannot remain oblivious to the danger, a danger of the severest gravity, that investigating officials, in an effort quickly to solve a crime, may exert such coercive tactics as to lead to the mistaken identification of an innocent individual. Moreover, in the context of prison environment, the guarantee of due process rights is no less important than is that guarantee to society at large. All law abiding citizens share the desire that all crimes be solved with reasonable speed, but speed, in and of itself, cannot justify the infringement of basic constitutional rights. And, it is well established, of course, that a prisoner does not shed his basic constitutional protections when he enters an American prison. *See Finney v. Arkansas Board of Corrections,* 505 F.2d 194, 211 (8th Cir. 1974) and cases cited therein.

SNEED, Circuit Judge (dissenting):

I respectfully dissent.

The majority concludes that there was "a systematic plan by prison officers to twist a photographic identification procedure in a manner calculated to obtain an identification of one they suspect"; that there was no necessity to use photographic identification procedures; and that the procedures employed here created a grave likelihood of irreparable misidentification. Fortified by my examination of the photographs employed on October 27, 1972 and October 30, 1972 and the fact that, leaving aside the direct appeal process, three courts of the State of California (Superior Court of Marin County, Court of Appeal, Fifth Appellate District, and Supreme Court of California) and one federal court (District Court, Northern District of California) have failed to discern the "systematic plan" and to reach the conclusions so easily arrived at by the majority, I conclude that the procedures employed did not contravene the *Simmons* test as interpreted by this circuit.

In addition, I suggest that the application of the *Simmons* test in habeas corpus proceedings should be somewhat less rigorous than is the case in direct appeals from federal convictions. That is, the likelihood of irreparable misidentification should be sufficiently clear and convincing in habeas proceedings to require a setting aside of the conviction to prevent manifest injustice. This position involves recognition that a vigorous application of *Simmons* in the direct appeal setting rests, in part, on our supervisory powers rather than exclusively on the command of the Due Process Clause of the Fifth Amendment.

I. THE SIMMONS TEST AS USED ON DIRECT APPEAL

In applying *Simmons* as it would be on a direct appeal, the majority concludes much too easily that there was no necessity in this case to use photographic identification procedures. I disagree. The prison setting of the crime for which appellant was convicted and the investigation thereafter by prison officials in my opinion dictate the use of photographic identification procedures. Apparently the majority insists as a matter of constitutional law that there be employed lineups of a large group of inmates, with each suspect, or more likely a substantial group of inmates, which would include the suspects, suitably equipped with counsel, in lieu of photographic identification procedures. *See* p. 759 n. 1. To state the requirement reveals its impracticability. Moreover, it would impose heavy demands on the staff, strain employee relations, and expose the inmates to increased risks of bodily harm.

The prison world is unique. It differs enormously even from the precinct stationhouse and police headquarters. A "code of silence" strengthened by taboos against "ratting" and a pervasive fear of retaliation are characteristics of the prison social order. In this environment prison administers and guards must function. Administrators are responsible for protecting prisoners in their custody and may be held liable for a failure to provide such protection. *See, e.g., Sostre v. McGinnis,* 442 F.2d 178, 205 (2d Cir. 1971), *cert. denied,* 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 (1972); Bennett, *Who Wants To Be Warden?,* 1 New England J.Prison L. 69, 69-70 (1974). Guards, directly responsible for prison order and security, jealously hus-

band their stock of authority and seek to avoid any confrontation that will deplete that stock. *See* National Institute of Law Enforcement and Criminal Justice, Prison Employee Unionism: The Impact on Correctional Administration and Programs 24-25 (1978). To require the type of lineup the majority envisions in this setting is to insist upon jeopardizing the security and safety of all as the price of securing the constitutional protection that the majority holds appellant is entitled. We should be reluctant to fashion constitutional doctrines whose price is so dear.

In any event, necessity, or the lack of it, constitutes but part of the *Simmons* test. *United States v. Crawford*, 576 F.2d 794, 797-8 (9th Cir.), *cert. denied*, 439 U.S. 851, 99 S.Ct. 157, 58 L.Ed.2d 155 (1978). The strength of the majority's position rests on the exertion of pressure by prison authorities on Almengor and Allen and the use of three photographic spreads in the manner described. Pressure was indispensable in the circumstances of this case if the crime was to be solved reasonably quickly. I repeat, prison officials must operate in a humane manner but also in a fashion that takes into account the realities of prison environment. The officials in this case, in my opinion, merely did what we as citizens demand of them, *i. e.*, protect the inmates by apprehending those who recently had preyed upon one of them.

The record of this case does not include the several hundred photographs shown to Almengor on October 19, 1972. The spreads of October 27 and 30, 1972, are included, however. So different is the appellant's photograph used in the October 27 spread from that of October 30 that it

is difficult to accept the fact that the appellant appeared in the October 27 spread at all. Nonetheless, I must accept that fact because both appellant and appellee agree that the appellant's photograph did appear in the October 27 spread. It remains true, however, that any failure to select the appellant's photograph in the October 27 spread may be attributable to the fact that it bore little resemblance to the appellant's appearance at the time of the murder of Arias.

The spreads of October 27 and 30, therefore, are not impermissibly suggestive on their face. Nor are they made so by the absence of the photographs of Ramirez, Reymundo, and Nunez. The range of choice available to Almengor and Allen remained large. Also, contrary to the majority's characterization is the weight that must be given to Almengor's description of the assailants of Arias and the consistency with which Vargas, one of the assailants, was identified. Admittedly the uncertainty surrounding Allen's motivations prior to his identification of the appellant compels us to review carefully the way in which the spreads were used. Allen's behavior, however, is consistent with an effort to avoid entanglement until his identification would yield the largest possible return to him. While such an attitude is not particularly noble, it is precisely the state of mind most prisoners would have under similar circumstances. In any event, I find it impossible to attribute his identification of appellant's photograph to an impermissibly suggestive use of photographic spreads. That Allen was subjected to official and unofficial pressures I do not doubt; but the *Simmons* rule should not be distorted to enable us to condemn on constitutional grounds

the inescapable use of such pressures in an investigation of a murder in a prison setting. Interpretations of our supervisorial powers or of the Constitution which ignore the realities of the environment within which they function bring discredit to both the courts and the Constitution.

II. COLLATERAL REVIEW AND SIMMONS

Should I be wrong about the application of *Simmons* to the facts of this case were it before us on direct appeal, I maintain that *Simmons* should be applied in habeas corpus proceedings so as to overturn convictions only in the case where clear and convincing evidence demonstrates that reversal is required to prevent manifest injustice. To so limit *Simmons* in habeas proceedings is in keeping with the scope the remedy historically has been given. *See Stone v. Powell*, 428 U.S. 465, 475, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich.L.Rev. 451 (1966). Although the scope of habeas relief has been expanded, it has remained a remedy for exceptional cases: "It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void." *Fay v. Noia*, 372 U.S. 391, 423, 83 S.Ct. 822, 840, 9 L.Ed.2d 837 (1963).

To apply *Simmons* in habeas proceedings to instances of manifest injustice requires recognition that "impermissible suggestiveness" for purposes of collateral review of state convictions rests on an interpretation of due process, assured by the Fifth and Fourteenth Amendments, that may not exhaust the full reach of *Simmons* which, it must be remembered, arose from a direct appeal from a federal conviction. Mr. Justice Harlan, speaking for the Court,

recognized that, in fashioning the *Simmons* standard, supervisorial powers, rather than constitutional commands, also could be the source of the Court's authority. 390 U.S. at 384, 88 S.Ct. 967. Limitation of *Simmons* in collateral review to "suggestiveness" so flagrant as to result in manifest injustice merely recognizes that the dictates of due process are somewhat less far reaching than are the supervisorial powers of federal courts over federal law enforcement officials. The existence of this difference appears to me to be neither unreasonable nor inconsistent with *Simmons*. It must be admitted that the distinction I suggest has not been utilized by the Supreme Court. *See Neil v. Biggers*, 409 U.S. 188, 196-09, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Manson v. Brathwaite*, 432 U.S. 98, 121-22, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (J. Marshall dissenting); Pulaski, *Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 Stan.L.Rev. 1097, 1106-09 (1974); *but see* Comment, *Photographic Identification: The Hidden Persuader*, 56 Iowa L.Rev. 408, 425-26 (1970). Nor has this circuit employed it. *See United States v. Allison*, 414 F.2d 407, 409 (9th Cir.), *cert. denied*, 396 U.S. 968, 90 S.Ct. 449, 24 L.Ed.2d 433 (1969); *United States v. Baxter*, 492 F.2d 150, 170-71 (9th Cir.), *cert. dismissed*, 414 U.S. 801, 94 S.Ct. 16, 38 L.Ed.2d 38 (1973), *cert. denied*, 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974); *United States v. Jones*, 512 F.2d 347, 351 (9th Cir. 1975); *cf. United States v. King*, 433 F.2d 937, 938 (9th Cir. 1970), *cert. denied*, 402 U.S. 976, 91 S.Ct. 1681, 29 L.Ed.2d 142 (1971) (the court quoted Mr. Justice

Harlan's opinion that the Supreme Court has both supervisory and constitutional powers of review).

Also, *Stone v. Powell, supra*, while useful as an analogy, does not precisely justify my position because there the evidence admitted in the state proceedings in no way could be thought to have been "created" by improper official conduct. Its admissibility might be barred because of an improper search and seizure, but its genuineness and probity could not be questioned. Here the situation is different. In court identifications carry some taint whenever any nonfrivolous issue regarding the use of photographic spreads is raised. The taint, moreover, puts in issue the truth of the in court identification. It follows, therefore, that the balancing process employed by the Court in *Stone v. Powell*, in which the utility of the exclusionary rule is weighed against the costs of extending it to collateral review, is not applicable here. A different approach must be employed, one in which the constitutional standard employed in collateral review is somewhat less demanding than the supervisorial standard employed on direct appeal.

Notwithstanding the inapplicability of *Stone v. Powell*'s balancing process, it remains true that its emphasis upon the opportunity for full and fair litigation in the state courts is equally applicable here. 428 U.S. at 494, 96 S.Ct. 3037. This opportunity to litigate an issue as imprecise as "impermissible suggestiveness" in the state courts strongly suggests that collateral review by federal courts frequently is redundant. Repetitive collateral review employing a standard so amorphous more resembles a game of chance than it does the wise administration of criminal justice.

To so employ the Great Writ is to corrupt, not enhance it. *See Sneckloth v. Bustamonte*, 412 U.S. 218, 275, 93 S.Ct. 2041, 36 L.Ed.2d 854 (Powell, J., concurring). I would affirm the district court.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 78-2636

Robert Mata,
Petitioner/Appellant,
vs.
George Sumner,
Respondent/Appellee.

[Filed Jan. 31, 1980]

ORDER

Before: ELY and SNEED, Circuit Judges, and TAKASUGI,* District Judge

Of the judges constituting the panel originally concerned with the subject case (Ely, Sneed and Takasugi), Judges Ely and Takasugi have voted to deny the Petition for Rehearing. Judge Sneed would grant panel rehearing. Judge Sneed has voted to reject the suggestion for rehearing en banc, and Judges Ely and Takasugi have recommended that the suggestion be rejected.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Petition for Rehearing is denied, and the suggestion for a rehearing en banc is rejected.

*Honorable Robert M. Takasugi, United States District Judge, Central District of California, sitting by designation.

Appendix C

In the Court of Appeal
State of California

Fifth Appellate District

5 Crim. 1735
(Sup. Ct. No. 15771)

The People,
Plaintiff and Respondent,
vs.
Salvadore Vargas, David Gallegos, and Robert Mata
Defendants and Appellants.

[Filed Aug. 4, 1975]

OPINION

APPEAL from a judgment of the Superior Court of Kern County. P. R. Borton, Marvin E. Ferguson and John M. Nairn, Judges. Affirmed.

Douglas J. Morgan, under appointment by the Court of Appeal, for defendant and appellant David Gallegos.

C. Michael Farmer, under appointment by the Court of Appeal, for defendant and appellant Salvadore Vargas.

Jim D. Mills, under appointment by the Court of Appeal, for defendant and appellant Robert Mata.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, Arnold O. Overoye, Joel

Carey and Anthony L. Dicce, Deputy Attorneys General for plaintiff and respondent.

Appellants herein, Salvadore Vargas, David Gallegos and Robert Mata, were tried jointly and were found guilty of murder in the first degree. All three were sentenced to state prison for the term prescribed by law. All three filed separate appeals, the contentions in which are treated here together.

FACTS

On October 19, 1972, inmate Leonard Arias was stabbed to death in a dormitory at the California Correctional Institution at Tehachapi. At approximately 1:30 p.m. of that day, Arias, one Rigoberto Almengor and one Jay Allen, all inmates of the institution, were drinking coffee and talking near Allen's bunk in Dormitory Eight. A call over the institution's loud speaker ordered all new arrivals to report to the laundry room. Arias had just arrived at the institution from San Quentin Prison the previous day and the three men thereupon proceeded to the laundry room.

On the way to the laundry room they passed three men who were standing by the bulletin board. These three men then turned and attacked the victim Arias. During the attack, Arias was stabbed with a knife several times, causing his death.

Each of the appellants denies partaking in the attack and subsequent killing; and each produced evidence tending to show that he was at another place in the prison at the time of the incident in question.

Multiple issues are raised by the respective appellants and assigned as prejudicial error requiring a reversal of the judgment.

I. *The Photographic Lineup Procedure.*

Both appellants Gallegos and Mata contend that there were prejudicial errors in the pretrial identification of them by certain prosecution witnesses.

Three inmate witnesses testified that they saw the stabbing take place. All three—Childress, Almengor, and Allen—identified all three defendants; but their testimony is attacked by appellants Gallegos and Mata on the basis of claimed improper pretrial photographic identification procedures. The witnesses were shown a number of photographs of Tehachapi inmates in an attempt to identify the slayers. Almengor was interviewed and shown photos on October 19, 1972, the day of the incident. He made a possible identification of appellant Vargas, but made possible misidentifications of the other two participants. On October 30, 1972, more recent photos were presented to Almengor and he identified all the appellants. On October 27, 1972, Allen was shown photographs but stated he could not make an identification because the photographs were old. On October 30, 1972, more photos were presented to Allen and he identified all three appellants. On that date Childress also selected all three appellants from photographs shown to him.

Appellants argue that the witnesses Almengor and Allen were housed in the same segregation unit with appellants, that they were aware that appellants were removed from the segregation unit to have their pictures taken and that

this makes their identification inadmissible. But they make no showing, and the record supports none, that the witnesses were in fact influenced in their identifications by this action of the investigating officers.

It is established that the safeguards set forth in *United States v. Wade,* 388 U.S. 218 and *Gilbert v. California,* 388 U.S. 263 do not apply to pretrial photographic identification of a suspect. (*People v. Lawrence,* 4 Cal.3d 273.)

The *Lawrence* case followed the decision by the United States Supreme Court in *Simmons v. United States,* 390 U.S. 377, which reached a similar result. Both courts reasoned that particularly where the photographs from which the witness made his identification were preserved and available at trial, as was the situation in the case at bench, counsel for the accused can easily reveal the possibility of prejudice by using the photographs in cross-examination. (*Simmons v. United States, supra,* 390 U.S. at 384; *People v. Lawrence, supra,* 4 Cal.3d at 278-279.) Both courts have determined that each case must be considered on its own facts, and that *a violation of due process occurs and a conviction will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.* (See *Simmons v. United States, supra,* 390 U.S. at 384; *People v. Lawrence, supra,* 4 Cal. 3d at 280.)

Reviewing the facts of the present case to determine if the particular photographic identification procedure used contained the proscibed suggestive characteristics, we first find that the photographs were available for cross-examination purposes at the trial. We further find that there is no

showing of influence by the investigating officers: that the witnesses had an adequate opportunity to view the crime; and that their descriptions are accurate. The circumstances thus indicate the inherent fairness of the procedure, and we find no error in the admission of the identification evidence.

II. *Denial of Discovery.*

All three appellants contend tht the trial court abused its discretion in denying a motion for additional discovery.

At the commencement of the trial, counsel for the defendant Gallegos, Mr. Simrin, renewed a motion for discovery which had been made before another department of the court previously, and had been continued generally for hearing before the trial judge. This motion had been instituted by a notice in writing, coupled with the declaration of the attorney, and requested information from the Department of Corrections concerning (1) records and reports concerning the membership or non-membership of one Ortega, a prospective prosecution witness, in the Mexican Mafia; and (2) records and reports concerning the membership or non-membership of the three defendants; and (3) a list of all those persons alleged to have been members of the Mexican Mafia as of October 19, 1972. Counsel for the other defendants joined in the motion.

Subsequently, at an in-chambers conference prior to trial, the motion was limited to records concerning the witness Ortega; all counsel agreeing that if this witness were not called there would be no reason to urge the motion.

Thereafter, the desired files of the Department of Corrections were obtained, and an *in camera* hearing was held wherein the material was found to be of a privileged nature

and it was further found by the judge that the privilege outweighed any probative value the evidence may have to the defense. Although the judge did disclose certain information in the file to counsel for the defendants, he found that the balance of the file was privileged and in any event contained no further material of any probative value to the defendants. After the court had announced its decision, counsel for one of the defendants moved for further discovery on the file. The court denied the motion, and refused to permit counsel to state a reason for the further discovery for the record.

Absent some governmental requirement that information be kept confidential, the accused in a criminal trial is generally entitled to have access to all evidence in the hands of the prosecution or in possession of other agencies which are part of the criminal justice system and which can throw light on the issues in the case. (*People v. Riser,* 47 Cal.2d 566; *Engstrom v. Superior Court,* 20 Cal.App.3d 240.) It is therefore necessary to inquire whether the type of information sought to be discovered in the instant case is confidential, official information.[1]

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[1]We are not unmindful of the cases of *Procunier v. Superior Court* (Losoya), 35 Cal.App.3d 207, and *Procunier v. Superior Court* (Herth), 35 Cal.App.3d, 211, which hold that almost identical information was absolutely privileged under the provisions of Government Code section 6255.

These decisions, however, ignore section 6260 of the Government Code, which provides:

> "The provisions of this chapter shall not be deemed in any manner to affect the status of judicial records as it existed immediately prior to the effective date of this section, nor to affect the rights of litigants, including parties to administrative proceedings, *under the laws of discovery of this state.*" (Emphasis added.)

It thus appears that section 6255 of the Government Code is not applicable to these proceedings, and for this reason we do not feel bound by these decisions.

Section 1040 of the Evidence Code governs the disclosure of "official information". It provides, in part, as follows:

> "(a) As used in this section 'official information' means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.
>
> "(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:
>
> "* * *
>
> "(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice . . ."

A provision for determination of a claim of privilege by the court is set forth in section 915 of the Evidence Code. This section provides as follows:

> "(a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division in order to rule on the claim of privilege.
>
> "(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both,

> to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither he nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers."

Thus, provision is made for an *in camera* hearing before the judge alone, with only the objecting party present, when the claim of privilege is raised.

Evidence Code section 1042(a) provides for sanctions upon the public entity invoking the privilege were necessary. It states as follows:

> "(a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material."

The Supreme Court has pointed out, in *Pitchess v. Superior Court* (Echeveria), 11 Cal.3d 531, 540, the results of the legislative enactment in the Evidence Code, as follows:

> "Evidence Code section 1040, therefore, represents the exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy. Evidence Code section 1042, subdivi-

> sion (a), in turn, codifies the due process demand recognized by the United States Supreme Court that the prosecution cannot commence criminal proceedings 'and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.' [Citations omitted.] In concert, the two provisions create an orderly and fair procedure designed to safeguard the legitimate interests of both the government and criminal defendants."

It is thus clear that there should be an *in camera* hearing wherein the trial judge examines the requested evidence when the privilege is invoked.

There is, however, a conflict amongst the cases as to whether or not an adversary hearing is necessary after the *in camera* examination of the evidence. In *People v. Superior Court* (Biggs) 19 Cal.App.3d 522, in a well reasoned opinion the court held that the *in camera* hearing provided by section 915(b) is merely a preliminary inquiry to acquaint the judge with the nature of the government secrets and the public necessity of confidentiality; that thereafter, the other Evidence Code sections requiring a preliminary determination of the foundational facts come into play, and that an adversary hearing should be held outside the presence of the jury to determine the necessity of the defendant for the information and the judge should then balance such necessity against the public necessity of confidentiality. At such hearing, the court points out, consideration of alternative evidence offered by the state could be given, and the needs of the defendant might even be satisfied in whole or part without destroying the confidentiality of the files.

In *People v. Woolman*, 40 Cal.App.3d 652, the court took a contrary view, referring to the language of *Biggs, supra,* as dicta and indicating the court's opinion that such a procedure would destroy the privilege the hearing is designed to protect. The court held nothing more than an *in camera* examination of the evidence is required.

Clearly there was no error here if we follow the precepts of *Woolman.*

We also find that in *Biggs* the court states (page 532):

> "In weighing the defendant's need, the court was not to pass upon the veracity of his claim, but only to ascertain if a reasonable possibility existed that the requested information might exonerate him."

In the instant case, it is clear that the sole purpose of the requested information was in connection with the testimony of the witness, Ortega.[2]

Thus the only purpose of the evidence could have been for impeachment of one witness; in *Biggs*, the purpose was to exculpate the defendant by showing that at the time

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[2]At the commencement of the trial, the following colloquy took place between counsel for the defendant Gallegos, who made the original motions, and the court:

"• • •

"THE COURT: Let me interrupt you for a moment. I am making the statement not as fact, but to elicit information if it is inaccurate. This whole matter turns really over a witness—Carlos Martin Ortega—

"Mr. Simrin: Correct.

"THE COURT: Well, if that witness were not called, then there is really no serious reason for you to urge your motion.

"Mr. Simrin: That is correct. And if the witness is not called, on behalf of Defendant Gallegos, I would withdraw my motion.

"THE COURT: That's what I gather from your documents. I want to be sure I am correct.

" • • •"

of the alleged offense, the defendant was acting as an informant and was an active undercover operator for the Bureau of Narcotics Enforcement.

It is obvious that under any interpretation of the facts, the required records in this case did not bear on the issue of guilt or innocence, but only on the impeachment of a single witness. Therefore, even under the rule enunciated in *Biggs*, there is no error requiring a reversal here.

Furthermore, the evidence in the instant case is overwhelming, with several eye witnesses as well as physical evidence pointing to the guilt of the defendants. Any error was therefore harmless (*Chapman v. California*, 386 U.S. 18; *People v. Stout*, 66 Cal.2d 184).

III. *The Aranda Rule.*

Appellants Mata and Vargas claim error in permitting into evidence the testimony of one Carlos Ortega concerning a conversation with their codefendant Gallegos. In this testimony Gallegos referred to "we", "they", and "them", presumably meaning Mata and Vargas as well as himself, in connection with various aspects of the stabbing. Later Gallegos wrote a note to Ortega saying that they did their job and took pride in themselves; here Gallegos allegedly mentioned Mata and Vargas by name.

No admonition restricting this testimony to the defendant Gallegos was given by the trial judge and no cautionary instruction was given the jury that the testimony could be used against that defendant only.

People v. Aranda, 63 Cal.2d 518, 530, established the rule that when the prosecution proposes to introduce into evi-

dence an extrajudicial statement of one defendant that implicates a codefendant, the trial court may either (1) permit a joint trial if deletions are made as to all implications of the codefendant; or (2) grant a severance of trials; or (3) exclude the testimony. However, it has subsequently been made clear by the cases that the failure to object and assert one's *Aranda* rights at trial constitutes a waiver of those rights. *People v. McGautha*, 70 Cal.2d 770, 785; *People v. Terry*, 38 Cal.App.3d 432, 443.

In the present case, the only objections to Mr. Ortega's testimony were upon grounds other than *Aranda* violations. Thus, appellants have waived any *Aranda* rights they may have possessed.

Furthermore, it appears that any adverse implications of these extrajudicial statements were ambiguous at best. Thus, even if appellants had preserved their rights on appeal by virtue of a timely objection, it is questionable whether the provisions of *Aranda* would be applicable. And even if *Aranda* did apply, the evidence so overwhelmingly pointed to appellants' guilt, that any error would be harmless. *Harrington v. California*, 395 U.S. 250, 252-254 (1969); *Chapman v. California*, 386 U.S. 18, 24 (1967); *People v. Epps*, 34 Cal.App.3d 146.

We accordingly find no reversible error here.

IV. *Failure to Instruct on Statements of Coconspirator.*

The statements made by appellant Gallegos (hereinbefore referred to) were admitted on representations of the prosecuting attorney that a conspiracy existed.

Appellants Vargas and Mata contend that in admitting into evidence these statements as an exception to the hearsay rule, the court should have instructed the jury on the law pertaining to the testimony of a coconspirator, *sua sponte*. No such instructions were requested by appellants at the trial.

Appellants contend that the giving of the appropriate conspiracy instructions would have required the jury to determine whether there was in fact a conspiracy and that appellant was a member of it before the jury could consider the incriminating statements by codefendants to implicate appellant; they further contend that existence of a conspiracy is a preliminary fact that must be found by the trial court before statements made during such conspiracy are admissible. (Evidence Code section 403; *People v. Goldberg,* 152 Cal.App.2d 562.)

But appellants have made no showing that a *sua sponte* instruction is required. Even in the analogous situation involving the duty to instruct as to the utilization of accomplice testimony, not all failures to so instruct constitute reversible error (*People v. Gordon,* 10 Cal.3d 460, 470-473). In such case a miscarriage of justice should be declared only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to appellants would have been reached in the absence of error. (*People v. Gordon, supra,* at 470.)

In this case, other evidence sufficiently pointed to the guilt of all three appellants. Eyewitness testimony placed all of the appellants at the scene of the murder and partici-

pating in it. Physical evidence, including gloves, a knife, and a jacket with blood on it were found. Statements of various defendants were included in the testimony. After an examination of the entire cause, including the evidence, the court is of the opinon that it is not reasonably probable that a result more favorable to appellants would have been reached had the court given the conspiracy instruction.

Thus any failure on the part of the trial court to instruct *sua sponte* did not substantially prejudice appellants and was not reversible error.

V. *Claims of Error in Admission of Evidence.*

Various alleged errors in the admission of evidence are cited as grounds for reversal. Appellant Gallegos claims error in the receipt of evidence relating to the Mexican Mafia and Nuestra Familia was prejudicial. He concedes that evidence relating to the existence of these two prison groups was proper; he contends, however, that the trial court committed reversible error in permitting testimony as to activities of these organizations relating to acts of violence occurring at other institutions in which appellant was not involved.

The activities of the rival inmate factions were the basis of showing motive in the prosecution's case. In connection with these activities, it was within the sound discretion of the trial court to admit evidence of the nature of the group and the nature of their activities in general in institutions; absent this latter evidence, testimony as to their existence would be meaningless. The admission of such evidence being within the sound discretion of the trial court, it will not be

disturbed on appeal absent a showing of abuse of such discretion. (*People v. Archerd,* 3 Cal.3d 615.)

Appellant Mata contends that the trial court erred in admitting the hearsay evidence of one Albert Mills, who testified as to statements another witness, inmate Childress, made prior to trial concerning the fact that he had witnessed a killing and feared for his life. Immediately thereafter Childress identified the defendants as the perpetrators from photographs. Evidence of such a statement was admitted to corroborate identification at the trial, and also as independent evidence of identification. This was proper pursuant to Evidence Code section 1238.[3] (*People v. Gould,* 54 Cal.2d 621, 626; *People v. Imbler,* 57 Cal.2d 711, 716.)

VI. *Misconduct of Prosecutor.*

Appellant Mata contends that the prosecuting attorney was guilty of prejudicial misconduct in asking the witness Schoo on cross-examination, "Isn't it a fact that you used to carry his shank for him?" Schoo was an alibi witness for the defendant Mata. No objection to the question was made at the time it was asked.

---

[3]Evidence Code section 1238 provides:

"Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and:

"(a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;

"(b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and

"(c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time."

It would appear that the question was appropriate in order to show bias on the part of the witness. No claim of dishonesty or deception on the part of the prosecutor is made (See *People v. Beivelman,* 70 Cal.2d 60, 75-77). We find no basis for the claim of misconduct.

The judgment is affirmed.

/s/ GINSBURG, J.*

We concur:

/s/ BROWN (GEO. A.), P.J.

/s/ GARGANO, J.

*Assigned by Chairman of Judicial Council.

Appendix D

In the United States District Court
For the Northern District of California

No. C-77-2801 SAW

Robert Mata,
Petitioner,
vs.
George Sumner,
Respondent(s).

[Filed May 23, 1978]

JUDGMENT

In accordance with the accompanying order,

IT IS HEREBY ADJUDGED that the petition for habeas corpus is denied.

Dated: May 22, 1978.

STANLEY A. WEIGEL
Judge

In the United States District Court
For the Northern District of California

No. C-77-2801 SAW

Robert Mata,
Petitioner,
vs.
George Sumner,
Respondent.

[Filed May 23, 1978]

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Robert Mata, imprisoned in San Quentin State Prison, Tamal, California, has petitioned for habeas corpus. An Order to Show Cause was filed on January 19, 1978, and a Return to said Order was filed on February 28, 1978. Petitioner filed a Traverse on April 4, 1978. Both parties have filed additional memoranda.

Respondent's first contention is that petitioner's claim cannot be addressed on the merits because he failed to raise some of them in the state courts. *Wainwright v. Sykes,* 433 U.S. 72 (1977). While it is true that petitioner did not raise all his claims on direct appeal to the state courts, he did raise his other claims in a petition for state habeas corpus. While that petition was denied without opinion, for purposes of habeas corpus review it is assumed that the state court addressed the merits of the petition. *Thompson v. Procunier,* 539 F.2d 26, 28 (9th Cir. 1976). Thus petitioner

has raised all the issues now raised in this proceeding to the California courts. *Wainwright* is therefore inapplicable.

On the merits, the Court concludes that the petition must be denied. While petitioner has established that irregularities occurred in the pre-trial photographic identification of petitioner by witnesses Almengor and Allen, these irregularities did not so taint the in-court identifications of petitioner by these witnesses as to establish a constitutional violation under *Simmons v. United States,* 390 U.S. 377, 384 (1968). *See United States v. Baxter,* 492 F.2d 150, 172 (9th Cir. 1973), *cert. denied,* 414 U.S. 801 (1973), 416 U.S. 940 (1974). Moreover, even if the testimony of Allen was tainted, the positive identification of petitioner by witness Childress and the strong one by Almengor makes the error harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967).

Petitioner's argument that he did not receive effective assistance of counsel is predicated solely upon what he conceives to be the egregious constitutional violation involved in the photo-identification procedure. Inasmuch as petitioner's *Simmons* claim is at best arguable, his counsel was not incompetent in failing to seek suppression of petitioner's in-court identification, whichever standard of competency is employed. *De Kaplany v. Enomoto,* 540 F.2d 975 (9th Cir. 1976) (en banc), *cert. denied,* 429 U.S. 1075 (1977). It is therefore unnecessary to consider which standard the Ninth Circuit will ultimately choose for determining the competency of counsel. *Cooper v. Fitzharris,* 551 F.2d 1162 (9th Cir. 1977), *petition for rehearing en banc granted.*

Petitioner's final argument, that the California Court of Appeal lacked an adequate record before it to enable it to review petitioner's appeal, also lacks merit. Petitioner was entitled to a record of sufficient completeness to enable the appellate court to find error, if there was error, in the proceeding below. *Draper v. Washington,* 372 U.S. 487, 497-98 (1963). That is precisely what petitioner received.

IT IS THEREFORE HEREBY ORDERED that the petition for a writ of habeas corpus is denied.

Dated: May 22, 1978.

STANLEY A. WEIGEL

Judge

Supreme Court, U.S.
FILED
OCT 28 1980
MICHAEL RODAK, JR., CLERK

No. 79-1601

In the Supreme Court
OF THE
United States

October Term, 1980

George Sumner, Warden of the California State Prison at San Quentin,
Petitioner,

vs.

Robert Mata,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

PETITION FOR CERTIORARI FILED APRIL 14, 1980
CERTIORARI GRANTED JULY 2, 1980

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 3, 1973--Conviction of first degree murder in violation of California Penal Code section 187 by jury in the Superior Court of the California, County of Kern.

July 5, 1973--Abstract of Judgment filed reflecting a sentence of life imprisonment.

August 4, 1975--Affirmance of the judgment of conviction by the California Court of Appeal, Fifth Appellate District, 5 Cr. 1735.

April 1, 1977--Petition for Writ of Habeas Corpus denied by the Superior Court of California, County of Marin.

August 2, 1977--Petition for Writ of Habeas Corpus denied by the California Court of Appeal, Fifth Appellate District.

November 14, 1977--Petition for Writ of Habeas Corpus denied by the California Supreme Court.

December 9, 1977--Petition for Writ of Habeas Corpus filed in United States District Court for the Northern District of California.

January 19, 1978--Order to Show Cause filed.

February 28, 1978--Return to the Order to Show Cause filed.

April 4, 1978--Traverse to the Return filed.

April 6, 1978--Hearing on Return held.

April 7, 1978--Declaration of Jamie Jacobs-May filed.

April 12, 1978--Supplemental Points and Authorities in Support of Petition for a Writ of Habeas Corpus filed.

May 23, 1978--Order denying Petition for Writ of Habeas Corpus filed.

May 23, 1978--Judgment filed.

June 21, 1978--Notice of Appeal filed.

July 25, 1978--Order granting petitioner's Application for Certificate of Probable Cause to Appeal and Proceed In Forma Pauperis filed.

September 11, 1978--Appellant Mata's Opening Brief filed in the United States Court of Appeals for the Ninth Circuit.

November 13, 1978--Appellee's Brief filed.

December 29, 1978--Appellant's Reply Brief filed.

August 15, 1979--Matter argued and submitted before Judges Ely, Sneed and Takasugi.

December 21, 1979--Opinion and judgment entered reversing the conviction and remanding to the District Court to hold the Petition in abeyance for 90 days within which time state prosecutors may initiate a new trial against appellant.

January 1, 1980--Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc filed.

January 31, 1980--Order denying rehearing and rejecting a rehearing en banc filed.

February 7, 1980--Mandate issued.

February 26, 1980--Appellee's motion to recall and stay mandate filed.

March 5, 1980--Appellee's motion denied.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KERN

No. CR-1735

The People of the State of California, Plaintiff, vs. SALVADOR VARGAS, DAVID GALLEGOS, and ROBERT MATA, Defendants and Appellants.

REPORTER'S TRANSCRIPT

Before Hon. P. R. Borton, Judge, Department 6, Bakersfield, California, June 11, 1973 through July 4, 1973.

Appearances:

For the Plaintiff:
Albert M. Leddy
District Attorney of Kern County

For Defendant Salvador Vargas:
Stephen M. Tauzer
Deputy Public Defender of Kern County

For Defendant David Gallegos:
Mr. Stanley Simrin
828 Chester Avenue
Bakersfield, California

For Defendant Robert Mata:
Mr. James T. Lanier
1408 - 18th Street
Bakersfield, California

[215] THE COURT: All right, Mr. McGillivray, you can open with your opening statement.

[223] The evidence will show that both J. Allen and Rigoberto Almengor had difficulty identifying the assailants.

[266] PAUL SCOTT CHILDRESS, called as a witness on behalf of the People, having been first duly sworn, took the stand and testified as follows:

[268] Q In what manner were you acquainted with Mr. Mata?

A The first time I met Mr. Mata was after I had bought some narcotics.

Q Was this in or out of the state prison?

A This was in the state prison.

Q Would you describe just how your contact with Mr. Mata came about?

A Well, I had bought this paper of heroin from a fellow named Gilbert Roybal.

Q Was he an inmate at the time?

A Yes, he was. And I didn't have the money right then when I bought it, and Gilbert said I should pay Mr. Mata for the paper.

Q Did you in fact give Mr. Mata some money instead of Mr. Roybal?

A Yes, I did.

Q Approximately how long before October 19th was that?

[269] A I would say three months.

* * *

Q Directing your attention specifically to October 19, 1972, Mr. Childress, can you tell us what you did on the morning of that day?

A Well, I got up at about 7:30, got ready to go to work, and I was supposed to be in the mess hall at 8:00, and I was in the mess hall by 8:00.

Q Now, what kind of work do you do?

A I worked utility crews, just general work in the kitchen.

Q Approximately how long did your work shift last that morning?

A Up until about 11:00.

Q What did you do next after finishing your morning work shift?

A I came directly back to the dorm.

[270] Q Back to your Dorm 8?

A Right, to my bed area.

Q Approximately how long did you stay in your bed area?

A I had a couple of cigarettes, took my shoes off, and layed down and slept for awhile. And I stayed there up until about 1:30, 2:00, until the officer woke me up.

Q Do you recall which officer it was?

A Yes, it was Officer Loomis, our dorm officer.

Q What happened after he woke you up?

A He woke me up about 1:30, and told me that the Education Office had called, and I was supposed to be at school at that time.

Q Were you regularly scheduled for school that afternoon?

A Yes, from one to 3:30 or 4:00. I am not sure of the exact hour, what it was.

Q Did you see where Mr. Loomis went after he woke you up?

A No. I just sat up on my bed, and I didn't pay no attention to him.

Q How long did you stay sitting up on your bed after you were awakened?

A I sat there about five or ten minutes, waking up.

Q And after you were sufficiently wakened up, what happened next?

A I woke up, and I was sitting there, and I was facing towards our bathroom in the dorm, and I noticed Mr. Gallegos [271] walked by my bed area.

[272] Q What is the next thing you either saw or did after Gallegos looked back over his shoulder and walked on?

A I was still sitting there, and on Bed 878, I think it was, there was two inmates talking.

Q Did you know either one of them?

A I knew one of them.

Q What did you know him by?

A I just knew him by his last name, was Allen.

Q What happened after you noticed the two inmates there?

A Well, the inmate Allen was talking to was sitting on the end of his bunk, and as I looked toward that bunk, he turned around and was facing me, looking in my direction. About that time I got up and went to the bathroom, and washed up.

Q Did you notice, Mr. Childress, where Mr. Gallegos [273] went after he passed you or looked over his shoulder?

A No, I didn't see him.

Q Did you notice anybody in particular as you went from your bunk to the bathroom other than Mr. Allen and the man with him?

A Yes, I did. As I was going toward the bathroom over by our exit door, there was a bulletin board, and I noticed Mr. Mata standing by the bulletin board.

Q Are you able to tell us from your recollection whether or not there were any other persons in the vicinity at that time and whether you recognized them or not?

A No, there wasn't anybody else there in the vicinity.

Q Approximately how long did you spend in the bathroom?

A I was there long enough to brush my teeth and wash up.

Q About how long does that take you?

A A few minutes. Five minutes, I guess.

Q After you finished your washing up activities, what did you do next?

A Well, I was looking in the mirror, and I decided I had better shave before I go to school, and at that time I didn't have any shaving cream in my locker, and I walked down to the far end of our dorm, and asked an inmate if I could borrow some of his shaving cream.

Q Do you recall which inmate that was?

A I think it was John Marsias, but I am not positive.

Q When you say the far end of the dorm, are you again referring to what you call the back of the dorm?

[274] A Yes, I am.

Q Is it correct there are four rows of bunks that go down the dorm and an aisle between each two rows?

A That is true.

Q Did you go down your own aisle where your own bunk was or the other aisle?

A My own aisle.

Q When you went down to try to borrow some shaving cream, do you recall whether or not Mr. Allen and the other inmate was still in Mr. Allen's bunk?

A No, I don't.

Q What happened when you tried to borrow some shaving cream?

A He told me he didn't have any, and so I just turned around and walked back to the bathroom.

Q And since you had not obtained the shaving cream, why did you walk back to the bathroom?

A Well, I had left my soap dish and towel and toothpaste in the bathroom.

Q When you went back into the bathroom to get those items, did you notice anybody in particular up in the vicinity of the front of the dorm?

A No, I didn't pay any attention to it.

Q Now, how long were you in the bathroom at that time?

A Not very long. Just long enough to pick up my soap dish and stuff, and I started back out toward my bunk area.

Q Did you notice anything or anybody as you approached the exit of the bathroom?

[275] A Yes. I was about half way out of the bathroom when I noticed the inmate that had been talking to Mr. Allen had just walked by the bathroom going towards the exit door.

Q At that time were you still actually in the bathroom? Or had you gone through the door?

A No, I was still in the bathroom when I noticed him.

Q What happened next that you recall?

A Well, I just headed back towards my bunk area, and as soon as I got out of the bathroom area, I heard a scuffling going on to my right.

Q When you heard that scuffling -- strike that.

Is it correct that there is a low wall that goes right down the center of the dorm?

A Yes.

Q And at the end of that wall toward the offices or toward the front of the dorm, there is a low wall that crosses it like a "T"? Is that correct?

A Yes, sir.

Q At the time you heard the scuffling you just mentioned, were you past that "T" that I just described, heading down to your bunk, or were you still in the area in front of the bathroom?

A I had just come out of the bathroom a couple of steps.

Q What did you do when you heard this scuffle?

A I turned to my right, and I observed four inmates. I thought they were fighting at the time.

Q Would you describe with a little more particularity [276] what they appeared to be doing as you walked out?

A There was one inmate in the middle, and three inmates were around him, and the inmate in the middle had his arms up.

Q How high? Can you demonstrate for us?

A About this high (indicating).

Q You are a little bit --about a foot above the shoulder?

A You want me to stand up?

MR. MCGILLIVRAY: Okay.

THE WITNESS: Like this here (indicating) with his hands closed like this here, and the other three inmates were moving in on him at that time.

Q Did you see them do anything with their arms at that time?

A Yes, they were going in with their arms like a thrusting motion.

Q When you demonstrated, you moved your hands straight out and pulled them back. Did you mean to do that deliberately or was it a swinging motion?

A No, that wasn't deliberate.

Q Having observed that what you have just described to us, what was your next impression what was happening there?

A I thought they were fighting, and then I noticed a small silver knife fall to the floor, and then I snapped to as to what was happening at the same time.

Q And you saw or you heard it?

A I saw it hit the ground.

[277] Q Did it make any sound as it hit, as you recall?

A Not as I recall. I just seen it fall.

[279] Q Mr. Childress, were you able to recognize any of the persons involved in this scuffle with Mr. Arias?

A Yes, I was.

Q And can you tell us who they were, please?

A The three gentlemen seated behind their lawyers.

[283] Q Incidentally, did you know either of the two defendants that you have identified as having had contact with in the past by any nickname?

A Yes, I have.

Q Which one or both?

A Mr. Mata. I knew him by the nickname "Biggs".

Q Biggs?

A Right.

Q On the day that this incidence occurred, did you report what you had seen to anyone?

A No, I didn't.

Q When was the first time that you reported this to someone?

A The following day between 2:30 and three, I think it was.

Q Did anything happen to you between the time of the incident and the time you reported it that had an influence on your reporting of the incident?

A Yes, I was sitting on my bed the following day. It must have been about 12:30 or 1:00. And a couple of inmates I have never spoken to before, they walked up to my bunk, and I had some magazines on top of my bunk, and these were Chicano inmates, and they asked me if they could read my magazines. And at that time I told them, "Sure. Go ahead", but I never talked to them before then, and that was just [284] kind of didn't seem right to me.

Q Did anything else happen later in the day that also had an influence on you?

A Later in the day?

Q Yes, immediately before you made your report?

A Oh, yes. This was about 3:30 or 4:00.

MR. MCGILLIVRAY: Okay.

THE WITNESS: I was walking up towards control, and there was three or four inmates that were behind me at the time. I'm not sure exactly who they were, and when I got to control, two officers stopped me and asked me what I wanted, and I told them I would like to talk to whoever was in charge. And Sergeant Mills had just came out of his office, and he took me into his office.

Q Is that an office that faces onto the yards outside the dorm?

A Yes.

Q Did you go into Sergeant Mills' office?

A Yes, I did.

Q And what happened next?

A I explained to him what I had seen the following day.

Q The following day?

A I mean the day before.

Q Did you tell him who the inmates were that were involved?

A Yes, I did. I told him what I knew their names by.

Q Did you know any of their names at the time that you reported to him?

[285] A Not their last names, no.

Q Did you report them by nickname, anything like that?

A Yes.

Q Tell us what you told him.

A Well, I sat down and --

Q Excuse me. Let me limit my question. I am not asking you to relate the whole thing, but as far as identifying the people, tell us what you told him.

A Yes. I told him what dorm I thought they lived in.

Q Which dorm?

A I told him it was Dorm 6, but it was really Dorm 5 they lived in, but I just mixed the numbers up on the dorm.

Q When you told him Dorm 6, did you have Dorm 5 in mind?

A Yes, I did.

Q What else did you tell him as far as identification is concerned?

A I just told him the nickname I knew them by.

Q What was it?

A One was "Biggs" and David's first name. That was all I knew of Mr. Gallegos name.

Q Were any additional steps taken to get the persons identified while you were with Sergeant Mills?

A Yes, he brought in a Rollodex of pictures of inmates and had me go through them.

Q Is this a circular file sort of?

A Yes, it is.

Q Can you give us a rough estimate of how many [286] photographs would have been on

that Rollodex?

A Two hundred.

Q Were you able to pick anybody's picture out of that as being the person you had seen involved in the scuffle?

A Well, first, he brought Dorm 6's -- photographs of Dorm 6, and that's when I understood that I made the mistake on the dorm.

Q Did you identify anybody from Dorm 6 photographs?

A No, I did not.

Q What happened next?

A Then he went and asked me, "Are you thinking of Dorm 5?" And I explained what dorm I was talking about, and he said, "That's Dorm 5". And he went and got some more photographs, and I went through those, and picked out two inmates -- Mata and Vargas.

Q Did you see Mr. Gallegos' portrayal

in those pictures?

A No, I had to go through some more photographs.

Q Were some more photos brought -- would you tell us how that happened?

A I wasn't sure what dorm he lived in, and they just brought a whole bunch of photos, and I identified him. I had to go through them all, and when I came to his, I picked it out.

Q When you identified these three persons from the various photographs you were shown, did you have any doubt about your identification of them?

A No, I did not.

[287] Q Do you have any doubt now?

A No.

Q Looking at these men now, do any of them appear to be any different or have any different appearance than when you saw them?

A Yes.

Q Would you describe which one or ones, and what the differences are?

A Well, Mr. Mata had a mustache that day, and Mr. Gallegos didn't.

MR. LANIER: I didn't hear, your Honor. Mr. Gallegos didn't what?

THE WITNESS: Didn't have a mustache.

[289] Q Now, after you were placed in segregation, did you see also in segregation any of the three defendants?

A Yes. I seen all three of them.

Q Did you have any conversation with any one of them relating to this incident that you've described?

A Just one.

Q Which one?

A That was David Gallegos.

[290] Q Okay. Would you tell us, please, as best you can recall, what you said and what he said in the conversation that related to the incident.

[291] A Yes. He asked me if I was ratting on this thing.

Q What did you say?

A I told him no, I wasn't, that I was in school that day, and he said, "well then, I'm not going to say anything about it. I'll just let it drop."

[302] Q Now, during the time you watched Mr. Arias, the victim, at Mr. Allen's bed, did you see anybody else come to that bed?

A No.

Q You didn't see Mr. Almengor come to that bed, did you?

A No, I didn't.

Q As a matter of fact, you didn't see Mr. Almengor anywhere that day, from the time you woke up until the time you got back to your bed after all this scuffling took place.

A That's correct.

Q Now, when Mr. Arias was walking in front of you, do you know where Mr. Allen was?

A No, I don't.

Q Didn't see him at that time at all.

A No, I didn't.

Q And you stood there and watched the scuffling for about ten or fifteen seconds, didn't you?

A That's correct.

Q You had a good look at it. You didn't just glance [303] over for a second and turn you head away.

A No, I didn't.

Q Just stood there for a while and you stared to see what was going on.

A Yes.

Q You didn't see Mr. Allen?

A No, I didn't.

Q Didn't see Mr. Almengor.

A No.

[327] Q Mr. Childress, I believe when we broke for lunch, you were describing the relative positions of the three men you say were involved with Mr. Arias, and as you have

outlined them on the chart before you. Is that correct?

A That is correct.

Q And is it your testimony that these three men stood in positions -- basically in the positions -- that you have marked here during the whole scuffle -- during the whole time you stood there?

A That is correct.

Q You never at any time saw them change positions, one with another?

A No.

Q How long did you stand there in total?

A About ten or fifteen seconds.

Q Just a few seconds?

A Uh-huh.

[328] Q And during that fifteen seconds, it is your testimony that is the only time that you saw Mr. Vargas or the man you claim to be Mr. Vargas in the dorm that day?

A That is correct.

Q And during that whole ten or fifteen seconds, Mr. Arias, the victim was more or less between you and Mr. Vargas?

A That is correct.

Q Now, was there anyone else standing between you in the bathroom door and this scuffle that was going on?

A No, there wasn't.

Q No one walked in that area at any time that you were there?

A No.

Q And you know Mr. Almengor, and you know Mr. Allen?

A Yes, I do.

Q You didn't see either one of them in the area?

A No.

[330] Q You say when you stood there, during most of the time you saw what appeared to you to be a fist fight? Is that correct?

A That is correct.

Q And you say you saw the three

attackers lunging or striking at Mr. Arias?

A That is correct.

Q Is it your testimony that you didn't see any knives at that time?

A That is correct.

Q And in fact, you didn't see any knives at all except for the one that fell on the floor?

A That is correct.

Q That is the one you described here as Exhibit 8?

A Yes.

Q How far were you from this scuffle?

A About fifteen feet, I guess.

Q Did you ever get any closer?

A No, I did not.

Q And did you ever see this knife before that fell on the floor?

A No.

Q But you actually saw it there on the floor?

A Yes, I did.

[346] Q So I understand you correctly, Mr. Childress, did you see them run out the door?

A I seen somebody run out the door.

Q When did you see them run out the door?

A When did I see them run out the door? After I had gotten back to my bunk and put my stuff away, and stood up.

Q Some two or three minutes later?

A Yes.

[365] RIGOBERTO ALMENGOR, called, sworn and examined as a witness, testifies as follows:

[366] Q Are you presently on parole from your commitment to Tehachapi?

A Yes, sir, I am.

[372] Q Mr. Almengor, at the time on October 19th when you went down to Jay Allen's bunk area and the people there had some coffee, did you have some conversation with Mr. Allen and Yogi?

A Yes, I did.

Q About how long did that conversation last?

A About 20 minutes, maybe 15.

Q Were you down there the whole time during that 15 or 20 minutes?

A Yes, Sir, I was.

Q Okay. Where did you go next after that conversation?

A I went back to my bed area to pick up my glasses.

Q Okay. What happened next after you went back to get your glasses?

A I started going in the t.v. area and as I was going to the t.v. area, they called out on the loudspeaker, 'all new arrivals report to the laundry room' and he was a new arrival.

Q Okay. How far were you toward the t.v. room? [373] Had you left the bunk area yet?

A I was already getting close to their bunk areas, almost a step away.

Q Okay. What happened atthat point after the announcement came over the loud-speaker?

A That's when I got an invitation from Jay Allen telling me if I would like to go with him to the laundry room, with him and his friend.

Q Okay, did you decide to go with him?

A At first I hesitated and kind of took about two more steps, and I told them I guess it's all right, and I decided to go with them.

Q Okay. What happened next?

A Next. Then Jay Allen is grabbing his coat at the time.

Q Excuse me?

A Jay Allen started grabbing his coat.

Q Grabbing his coat.

A Yes, and we started walking away, me and Mr. Arias, and Jay Allen is about two steps behind Mr. Arias, buttoning up his coat.

Q Where were you?

A By then, me and Mr. Arias was by the water fountain and we was passing the water fountain.

Q Were you and Mr. Arias side by side, or was one ahead of the other, or what?

[374] A Me and Mr. Arias were almost side by side.

Q Okay. And approximately how close to him were you?

A Almost even.

Q Okay. Let me rephrase that question. If this table was Mr. Arias, how far away from him were you? Were you right next to him, or a little bit away, or what?

A I was just about so far from him.

Q About like where I'm away from the table?

A Yes, because when we started walking out the door, we just closed up together.

THE COURT: For the record, "like I am" is approximately three feet.

MR. McGILLIVRAY: Q Now, did you notice anybody standing anywhere in that area at the time that you were walking past the t.v. entrance, and so forth?

A Yes, sir.

Q And where were these people that you noticed?

A Two of them were at the bulletin board, and one of them was by the wall that comes out right next to the bulletin board.

Q Is that a wall that's only about four feet high or so?

A Yes, sir.

Q Okay. Do you recognize any of the people that were standing there, those two at the bulletin board and one at the little wall? Do you recognize any of them in the courtroom here today?

[375] A Yes.

Q Would you tell us which ones you recognize?

A The one in the yellow shirt and the one on the right hand side sitting back.

Q The fartherest away from you?

A Yes.

Q Where was the one in the yellow shirt?

A The one in the yellow shirt was on the right hand side of the bulletin board, and the other one in the gray coat was on the left hand side of the bulletin board as you were walking out the door.

THE COURT: The record will again show that the yellow shirt is Mr. Mata, and that the gray coat on the right, as was stated, Mr. Gallegos.

MR. McGILLIVRAY: Q Now, did these persons have their -- which way were they facing? Were they looking at the bulletin board, or the other way?

A They were pretending like they were lokking at the bulletin board, like they were

reading papers on the bulletin board. They also had their hands pointing at the bulletin board.

Q What was the other person doing at the wall?

A He had one of his hand inside his jacket and the other hand on the wall.

Q Which way was he facing?

A Facing the dorm area.

[376] Q Out into the bunk area?

A Yes.

Q Do you recall what kind of clothing these individuals were wearing?

A Yes, sir.

Q And what was that?

A They were wearing a regular state pant issue and a regular state jacket issue, the levi jacket issue and beanie caps.

Q Did all three of them have caps?

A Yes, they did.

Q Did you notice whether they had anything on their hands?

A Not at the time while they were standing.

Q Okay. Now, would you tell us what happened as you and Mr. Arias and Mr. Allen behind you approached the door?

A As we approached the door, well all three of them -- the two at the bulletin board turned around real fast, and as they turned around real fast, I took two steps away from Mr. Arias, stepping back from him. [377] Okay. You told us these two men at the bulletin board turned around fast, and you went back a few steps. What happened next that you saw?

A I saw them approach Mr. Arias, and as they approached Mr. Arias, I noticed they were hitting on him, but yet I hadn't noticed that they were stabbing him or killing him or nothing. I just thought it was a physical fight at the time.

Q What happened next?

A So, I continued looking at them, but the guy at the wall that was at the wall, he had one of his shoulders turned around, and as I was looking at him, I seen him pull a knife out of his back.

[378] Q Pull the knife out of whose back?

A He pulled a knife out of Mr. Arias' back.

A Can you describe this knife for us?

A Most likely I can.

Q Could you give us a good try, please.

A Yes. I can give a try. It was a long knife, about this long. It looked like a long butcher knife, one of the butcher knives they have in a butcher shop. Long and pointed.

MR. LANIER: For the record, I think he was indicating about eighteen inches.

* * *

Q Is this in any way similar to the knife?

[379] A Yes, it's similar to the knife that I seen come out of his back.

Q Okay. What happened next, Mr. Almengor, that you either saw or that you did after you saw the man, that had been standing by the little wall, pull the knife out?

A I looked at Jay Allen to see what he was going to do, and as I seen Jay Allen, I seen that he was attending to nothing; that he wasn't going to do nothing, you know.

Q Where was he in relation to Mr. Arias?

A He was about two steps away from the fight, and so I started to approach the fight when one of the inmates that was -- that was stabbing Mr. Arias seen that I was approaching him, and he pulled away from Mr. Arias and did like a sloop turn, and then all that left me, I seen the one that was in the middle, and he turns around and looks at me, and I was going to approach the one that's

stabbing him in the stomach, but only, I seen -- with the sight of my eye -- that the other one that slooped and pulled away from Mr. Arias started coming at me.

Q Okay. Let me interrupt you here. Now, can you tell us which one of them it was, that as you say, slooped away from Mr. Arias and was coming towards you?

A Yes, sir. It was the one in the yellow shirt.

Q And which ws the one that you referred to as stabbing him in the stomach?

A That one in the gray coat, sir.

Q Now, did you actually see a knife going into his [380] stomach, or were you seeing strokes?

A No. I was looking at strokes, stroking him in the stomach.

Q Okay. Mr. Almengor, I'm going to show you Exhibit number 8 and ask you if this appears to resemble the knife that you saw in the hands of the man with the yellow shirt?

A Yes, sir.

Q Again, you can't be positive this is the one. Is that correct?

A No, sir, but it was a small one like that one.

Q All right. What happened when the man in the yellow shirt, Mr. Mata, came at you?

A When he came at me, well, immediately I only attended to what I knew was right, which I attacked him, too.

Q Did you have any weapon?

A No, sir. I didn't have no weapon.

Q What did you attack him with?

A I attacked him with my hands.

Q Okay. Would you describe what took place then between you and Mr. Mata?

A As soon as I seen Mr. Mata rushing me with a knife, I threw a small kick at Mr. Mata, at his knife, trying to throw it off his hands, or just so it won't, you know, stick me with it, and I seen he pulled down

his knife, you know, just like off balance in his hand, a little, and I attacked him in the middle and I pushed him all the way to the door [381] just in a straight fist to fist fight.

Q Are you saying all the way to the door, are you referring to the door that goes out of the dorm?

A Yes, sir.

Q How close to the wall did you get?

A We came real close to the wall, cause as we came to the wall, I even hit my elbows on my right hand as I'm swinging at Mr. Mata.

Q Okay. About how long did you struggle with Mr. Mata?

A Just a few seconds, I say, and then I backed off Mr. Mata and we stook there looking at each other.

Q Okay. Were you able to see what Mr. Arias and Mr. Gallegos and the other man were doing at that time?

A Yes, sir. They were still stabbing Mr. Arias. At the time I was fighting with Mata, when I stopped I heard a jingling sound on the floor, which was -- the one in the gray coat's knife that fell down. It fell out of his hand, or either broke. I don't know what, but as I looked down at the floor, I seen his knife on the floor close to in between Mr. Arias' legs, and I was going to go for it and pick it up, but I decided that I didn't need no knife.

Q Mr. Almengor, I'll show you now what we have had marked as Exhibit number 9 -- or 6. Which is it, Mr. Clerk?

THE CLERK: That's number 9.

MR. McGILLIVRAY: Q Okay, our Exhibit numbe 9, and I'll ask you whether or not this appears to resemble what you saw [382] fall to the floor.

A It was similar to that right there, yes.

Q Again, you cannot be sure --

A I cannot be positively, you know, sure that that is, you know, the one on the floor, because I didn't pick it up, but it looks most likely to be the one.

Q Now, what happened next that you can recall after you saw that blade -- that part of the knife fall to the floor?

A When I saw part of the knife fall to the floor, then I just look at -- I looked at Mr. Mata again in the face, you know, and like, I gave him a motion of sign that, you know, that I didn't want to have nothing to do with it, see. It's none of my business.

Q How far away from you was he at that time?

A At that time?

Q Yes. When you made the motion.

A He was -- he was about where that speaker right there is to that white bulletin board, that middle speaker.

Q From here over to here?

A Maybe a step closer to the bulletin board.

Q About from where I am now?

A About right there, yes. About right there.

Q Approximately six feet?

A Yes, about there.

THE COURT: Pretty close.

MR. McGILLIVRAY: Q Could you stand up right where you [383] are, Mr. Almengor, and show us what kind of a motion you made to Mr. Mata?

A As me and Mr. Mata were looking at each other, I just like gave him a motion that I didn't want, you know, I didn't want to have nothing to do with it, so I just went like this to him and started backing off, and he seemed to understand, so he turned around and ran out the door, and as he was running out the door, the others followed him, the one in the middle and then the third one, the tallest one.

Q When they ran out the door, did they have to run past you?

A Yes. They had to run past me.

Q All right. At the time they were running out the door, did you notice what was going on with Mr. Arias and Mr. Allen?

A By then I seen Mr. Allen putting down Mr. Arias. He caught him, you know, as he was -- before he fell, and he was catching him and laying him down. That's when I went, also, to Mr. Arias. When I got there, when I got through stepping to where he was at, Mr. Jay Allen had already laid Mr. Arias down on the ground. I kneeled down to see. I didn't know what to do, you know, so I kneeled down to touch Mr. Arias to see if he was dead, and I could hear all the breath coming out of Mr. Arias, and at the time I got blood on my pants.

[385] A When I saw Mr. Loomis to do that and telling everybody, 'back to your bed areas,' I knew that that dorm would be

crowded, you know, with officers just any minute now, you know, so immediately I -- I did exactly what he said and I went back to my bed area and changed. As I was walking back to my bed area, Jay Allen's brother, Fred Allen, tells me that I have blood on my pants, so that's how I knew I had blood on my pants, cause I didn't know that I had blood on my pants. So immediately I got back to my bed area and change in a full set of different clothes, state clothes.

Q You took off the clothes that had the blood on them.

A And took off my state shoes and put on the regular street shoes that I had at that time there in Tehachapi, but [386] all the rest is state issue, and I threw my clothes a few bunks away from my bunk.

Q Now, what happened after you discarded your clothes? What did you do?

A Well, I just, you know, I stood calm, and I asked if I could use the rest-

room, and I went into the restroom and washed my hands, cause they told everybody to stay in their bunk areas, so I pretended to have went in the restroom, and I washed my hands where I could see there was blood.

Q Was there blood on your hands?

A Yes, where I touched Mr. Arias.

Q What did you do after you washed your hands?

A I came back to my bed area and it was crowded with officers at the time but Jay Allen was still attending to Mr. Arias, which they took him immediately, so I was the only one left there in the dorm area, so now they shake the dorm down to see if they could find some of the parties that were involved, to see if they could find anyone that has blood on them.

Q What do you mean by shake down?

A To check your clothes, your locker, to see if there's any knives, any kind of

weapon in your locker, or any blood -- anything that might lead to any kind of evidence.

Q In other words, search the dormitory to see if they could find anything that might help them investigate?

A Yes, sir.

[387] Q Okay. Did they shake you down and shake your bunk down?

A Yes, sir.

Q And what happened at that time?

A At that time they passed me through. They didn't find nothing wrong with me. They passed all the way through on the first shake down, and as -- they kept walking around. One of the officers -- they didn't even find the pants. They didn't pay no attention to the pants on the floor in the middle of the aisle. They just figured they were there -- but one of the officers just kep walking around, and he noticed that, you know, some pants were on the aisle, so he picked them up, and as he picked them up, he seen that

they were full of blood, so they figured that one of the involving parties was still in that dorm.

Q What did they do then?

A So then they decided to throw another shake down. This time to throw down a skin shake down to see if anybody's gots any cuts on their body, or anything, or any blood on their bodies. So they throw this skin shake down down and also they don't find nothing, but now they go to the pants. Now they want to know who these pants fit in that dorm.

Q What do they do with the pants to find out?

A They get the pants. They come back later with the pants, and wherever he found -- when he picked them up, he marked the bed area where he found --straight to the bed area [388] where he found them, and took them to the officers and discussed it with the other officers and came back.

Q That was just a couple of bunks down from your bunk?

A Yes, sir. About two and a half bunks, in the middle of the third bunk away from mine. So they tried them on eight guys in front of my bunk area down to where they were at. Eight guys that way, and they tried them on eight guys this way, and now then they tried them on eight guys that were in my bed area in the row I'm in, and eight guys this way, and when they came to mine, they fitted me, but only -- they tried me last.

Q You were to last one they got to?

A Cause the pants read out 32-34.

Q Were they tailored for you?

A Yes. I had them tailor made for me, and all my clothes were made that way, and they only fitted me in the whole dorm, so they knew it was me.

[390] THE WITNESS: Me and Mr. Arias are approaching the door to go out the dorm, and Mr. Arias is looking down, sort of down,

speaking to me, and at the time there is three -- two people at the bulletin board and one at the wall. As soon as they turn around real rapidly in a fast movement, I took two steps back, like this -- about two and a half steps back, and I just stood there, and looked, you know, to see why they took that fast movement --why they did that fast movement.

[391] Q Okay. Now, at that point, did Mr. Arias put his hands up?

A Yes, at that point Mr. Arias looked right away up like that, too.

Q Now, when these people got to Mr. Arias -- the three men -- could you demonstrate for us where each one was? You told us one of them was Mr. Mata -- the man in the yellow shirt?

A Yes, sir.

Q Using me as Mr. Arias, demonstrate for us how you saw Mr. Mata, to begin with.

A Mr. Mata is at the bulletin board, looking up, sort of like this, with his hand like this (indicating) at the bulletin board. And he turned round rapidly, and he attacked Mr. Arias, and he was like right here beside him.

Q He was on Mr. Arias' right side?

A Yes, on Mr. Arias' right side, right here.

Q And then he would have been reasonably close to you? Is that correct?

A Yes, uh-huh.

Q Now, what about Mr. Gallegos?

A Mr. Gallegos turned around in the same fashion -- turned around like this, and went at him in the middle of his stomach, and he slooped down like this, and he was stroking him, like this, down here.

Q What about the third person?

A The third persons was at the wall. There was just a wall like this, and he had his hand up. And he had his hand [392] like

this, and he also turned around, but he grabbed him like this, and he stooped him over like this, and at that time already Mr. Arias had his hands up, like this (indicating), saying, "No", and "No", and this person right here stabbed him in the back.

Q Is that when you saw the knife come out of the back?

A Yes, because I was hearing body contact, and looking at him, but I still don't know where they were stabbing him until he pulled it out of his back. That's when I seen him. This guy up here is looking at me because I'm about right here, and I'm looking at this one.

Q You are looking over Mr. Arias' shoulder at him?

A Yes, uh-huh. That's all I could see at the time. And right now I can't see these other two right here. I didn't know here was two more there, you know. I could

see only one stabbing him in his back and pulling the knife out of him in the back.

Q Now, you described for us that Mr. Mata, I think you said, slooped off?

A Yes.

Q Could you described what motions he made or show us rather?

A While that motion is taking place, and back here, looking at the young man stabbing him in the back. And I realize what's going on at the time. And so I think at least I could help him and take one of the men off him, which I looked at Mr. J. Allen on this side after I have seen this [393] young man stabbing him in the back, and I look at J. Allen, and I see J. Allen is not going to attempt nothing, and I see that, you know, and that I try to move in, you know. While I'm moving in to get Mr. Mata down, but he doesn't go in because that guy that is stabbing him in the back throws a stroke at

Mr. J. Allen, you know, and as I move in, Mr. Richard Mata sloops over like this.

Q Let's make believe here you are Mr. Mata. Would you show us --

A Mr. Mata is stabbing him like this.

Q And you are moving in --

A And he is stroking him, and looking at me like this to see if I am going to move in or what, you know, as soon as he see I started to move in, he sloops over like this, and he keeps looking at me, and he sees that -- I might be -- David Gallegos, because David Gallegos looks at me, you know.

Q At that point could you see David Gallegos?

A Yes, because David Gallegos was like this, and he just looked at me to see if I am approaching. But at that time Mr. Mata then, you know, he took -- sloops around sideways like this. He went back, stroking at me, like that.

Q Is that when you and he started to struggle?

A Yes. I didn't attempt to do nothing else because I seen him coming at me, like this, and so I just went at him, like this, turned around there, and we were fighting all the way up to the dorm.

Q You told us you actually hit your elbow on the wall?

A Yes. We went all the way to the door fighting, and [394] I hit my elbow on the wall. The door -- the wall, that would be about right here. We fought all the way up to here, and the door would be about right here, and I hit my elbow on the wall because wer were so close to the office wall.

[396] Mr. Almengor, when we left off your testimony Friday, you had just described how they found that you may have been a witness to this thing because the trousers that they found fit you. After they found that out, that it was your clothes that were there on

the floor, did you have an interview with correctional officers and Detective Higgins from the Sheriff's Office?

A Not right away, no. At first I was still making my mind up if I was, you know, going to co-operate with them. And they left me in the office for a long time, and took photographs of where the blood stain was at on my arm, my right arm, and had me keep, you know, my arm like that until all the photographs, and they took some alcohol with cotton on it, and took the blood off my arm to show that, you know, there was blood on my arm, and then finally, Lieutenant King talked to me. You know, he was there, talking to me, and I told him if he would like, you know, I would be more than glad to give them my full co-operation, you know, if he would like to go through any hassles or anything further. I told him, "I would be glad to co-operate with you and give you my

full co-operation, if you have to talk", and he took me to the office.

Q After that did you have an interview or a conversation with Lieutenant King?

[397] Q During the course of that interview, were you shown any pictures to try to identify as the pictures of the people you had seen attacking Mr. Arias?

A Yes, sir, I was.

Q Could you describe what kind of pictures and how many were shown at that time?

A I asked to be shown all the Mexican -- all the Mexican population on that side of the fence.

Q That would be on the medium side?

A Yes, sir.

[404] Q Looking at these three defendants in court today, is there any one of them or two of them that you are positive that they were involved in this?

A Yes, sir. There is only two of them I am positively sure they are the ones.

Q And which two are those?

A Mr. David Gallegos and Mr. Robert Mata.

[415] A Well, I wasn't really noticing if there was anybody else around. My attention was if I seen any Mexican guys inside the dorm because that's the real danger I had my eyes on.

[420] Q BY MR. TAUZER: Now, you were shown pictures on the 19th of October, the day that this incident happened, and you picked out a picture of Bogus Pete, Pete Nunez? Is that correct?

A Yes, sir.

Q And you described him to the prison officials as tall, dark, Indian-looking?

A Yes.

Q Which one of these three men did you say that he looked like? Which one of these three attackers?

A The tall one.

[424] A Yes, sir.

Q Is there any difference between that picture and the way Mr. Vargas looks in person?

A Yes, sir, there is.

Q Is there anything about that picture that caused you to be confused about your identification?

A Yes, sir. His dark complexion, and I didn't know the height of Mr. Vargas, what he looked like, you know, until I seen him one day in the shower area.

Q In other words, you couldn't tell the height of the man from looking at that picture?

A Yes, sir, I couldn't tell the height of the man looking at the pictures.

Q And the complexion looks different than Mr. Vargas looks in person?

A Yes, he looks much darker right here.

Q He looks darker in the picture?

A Yes, the picture is black and white.

[433] Q Isn't it a fact that before you changed your mind about the gentleman in the upper left hand corner, you were advised by the police officers that he was outside of the institution that day?

A Yes, sir.

Q And before they told you that, you were fairly certain he was the fellow who was at the wall, aren't you?

A No. I wasn't positive sir.

Q Well, were you fairly certain, Mr. Almengor?

A I said out of these eight pictures, these three or four pictures, one out of them, that these three pictures fit you know, that guy, you know.

[437] Q And that day, you didn't identify any of the photographs except a possible identification of Mr. Vargas. Isn't that right?

A Not positive, sir. I never made a positive identification. I told them that until I see the men, I will be able to give a full positive identification.

* * *

Q Now, when you gave that tape recorded statement, didn't you say that when you first saw these three people, they were looking away from you, two at the bulletin board and one into the dorm? Do you remember saying that?

A Yes. One into the dorm.

[445] "Question: Did you at any time see them take Mr. Mata [446] and Mr. Gallegos and Mr. Vargas out of there together?

Answer: Yes, sir. One time.

Question: They took the three of them out together.

Answer: Yes, sir.

Question: And then brought them back?

Answer: And then brought them back.

Question: Was it after this that you looked at some pictures and made some identification?

Answer: Yes, sir. They took them out to take their pictures.

Question: Did you know that?

Answer: Yes, I knew that."

Q Do you remember testifying --

A I knew them after I seen them pictures, but I didn't know who they were. I just seen three persons. That's why I said yes, I seen them take them out, but I didn't know them. I hadn't seen their faces. That's why, as soon as I seen Mr. Vargas' fact in the shower, right away I corrected myself and said that that is not him, and if I had known anybody else was not the one, I would have also corrected myself in that area.

Q You did see them take Mr. Gallegos out?

A I did see Mr. Gallegos.

Q And you knew he was going to get his picture taken?

A Yes, sir, and I did know that he was one of them.

[449] MR. SIMRIN: Q Mr. Almengor, do you want to tell the court why you were transferred from the minimum side to the medium side?

A Yes, sir. There was a blue rag on my bed, a rag of blue on my bed.

Q And was that the first time that that had happened?

A No, sir. It had had happened before, sir.

Q As a matter of fact, you had been caught glue sniffing three times, had you not?

A Yes. Two other times, and at that time I finally told them to transfer to the other side, because my brother was also there and I didn't want them to bring any attention to my brother.

Q And you had been glue sniffing since you were eight years old?

A No, I haven't been since then. I was back at then. Okay?

Q I see. Now, at the time this scuffling took place, were you wearing your glasses, Mr. Almengor?

[450] A No, sir. Like I am right now.

Q And you are nearsighted, are you not?

A Yes, sir.

[457] Q Now, when you identified the photographs on October 30th, when you first made the identification of Mr. Gallegos, didn't you say then that you had previously correctly identified Mr. Vargas?

A No, sir. Not positive. I never made a positive identification. I told Lt. King 'when I see the man before me present at the preliminary, I'll be able to give you a full identification, unless you want to show me a line up'.

[465] Q Mr. Almengor, you had been taken from the barracks or the dorm after a skin search, hadn't you?

A Yes.

Q And they had found blood on you, hadn't they?

A Yes.

Q And they took you over to the office to do a little further interrogation, did they not?

A Yes, sir.

Q You were a suspect in the murder at the time? Correct?

A Yes, sir.

[466] Q Isn't it a fact, Mr. Almengor, that you only picked out four pictures as persons similar to the one who were involved in this crime?

A No, sir. I picked out about eight of them, sir, not being positively, just move likely for them to be the ones that fit, but four of them were one of the closest.

Q Well, that is the four you picked, saying they were the closest to the ones involved?

A Yes, sir.

MR. LANIER: Your honor, I would like to pass this to the jury.

THE COURT: All right.

(Exhibit passed to jury.)

Q (By Mr. Lanier) Mr. Almengor, when you selected these four pictures, you were trying your best to prove that you didn't commit this crime, weren't you?

A Well, not only that. I knew that I didn't commit it.

[467] Q But you had to prove it to them, didn't you?

A No, I didn't have to prove it to them because everybody in the dorm knew that I didn't do it.

Q Mr. Almengor, didn't the officers tell you you were a suspect at that time?

A Sure, but they didn't scare me that I was a suspect.

Q That didn't scare you?

A It most certainly did not, sir.

[479] Q I believe you told somebody on cross-examination that there was more than one of these persons that had a mustache at the time of the killing? Is that correct? Or did I misunderstand you?

A Yes, sir, that is correct.

Q Now, who besides the guy with the long knife had a mustache?

A David Gallegos.

Q Do you recall whether or not Mr. Mata had a mustache?

A No, sir, I don't recall.

Q Do you recall whether or not any of the three men that you saw attacking Mr. Arias were wearing gloves?

A Yes, sir.

Q How many of them?

A All three of them, sir.

Q What color were the gloves?

A They were black gloves.

Q As far as you know, were these state issue gloves?

A No, sir. They were street gloves, like the kind you buy out here, made out of black leather.

[496] Q Did you tell them you weren't making any positive identification and you wanted to see the person in person?

A Yes, sir.

Q You wanted to see a line up?

A Yes, sir.

Q And was anything said to you about providing a line-up to you?

[497] A Yes, sir. They were going to provide a line-up, and then something came about, and didn't ever -- it never came. I just didn't say nothing about it no more.

Q And the line-up was never offered to you after that discussion on the 19th?

A No sir. Only that it was offered to me.

[500] Q When did you see Mr. Vargas in the shower? Which one of these times?

A The last time when I identified the up to date photographs.

Q Okay. That was on the 30th of October, about eleven days after the incident?

A Yes, sir.

Q And could you tell us who was with you and how you came to see this man in the shower?

A Who was with me? Jay Allen was with me.

Q Okay, and you were being taken back into the segregation at the time?

A Yes, sir. I was being taken back to segregation.

Q And you were being taken back to the east wing where you stayed?

A Yes, sir.

[501] Q And was this shower on the west side that you saw Mr. Vargas in?

A On the west side, sir.

Q Did you have to pass by that shower to get to the east side?

A Yes, because I was brought to that side of the institution, so I had to pass right through there.

Q Okay. Let's talk a little bit about that man that you identified as Boscoe, the man you think might have been involved. Did you evertell anybody positively that that was the third man?

A Yes, sir. I told Lt. King, but I didn't give him no name.

Q Could you tell us exactly what you did tell him?

A Yes, sir. I told Lt. King, 'see, I called you here to let you know that the man that I picked, you know, was Mr. Vargas." I told them, 'the one in the place -- the one that did the killing,' I told them, 'the guy

that I picked is not that man.' I told them, 'I've seen him here in segregation and now I've seen Mr. Vargas, and when I seen him I was sure it wasn't him no more. When I seen him in person in that shower room, and that's why I called you here to let you know I did see the man the once before. I seen him in the overflow.'

And Lt. King told me, 'it's all right, just as long as you get -- when you get to court, if he's not the man, you go [502] right ahead. You tell them it's not the man.'

[582] FLORENCE JASPER ALLEN, called, shown and examined as a witness, testifies as follows:

Q Mr. Allen, directing you attention to October 19th, 1972, on that day did you have occasion to come into contact with a new inmate up there that you had known before?

A Yes.

Q Who was that inmate?

A That was Yogi.

Q Did you know what his true name was as opposed to his nickname?

A Arias. That's about it. I didn't know his real name. Just by his nickname.

[584] Q Where had you known him from before?

A I guess from my home town.

[586] Q How many people jumped?

A There was three that I could see.

Q Could you see where they were just before they jumped?

A Standing right almost in front of the door.

Q Did they jump at anybody in particular?

A Yeah. They moved on Yogi.

Q Now, when that happened, where were you in relation to Yogi? Next to him, in front of him, or behind him?

A I was standing next to him.

Q Were you doing anything besides just walking?

A I was trying to keep from being killed.

Q I mean just before these people jumped.

A I was buttoning up my coat.

Q Okay. Now, what did you do when these people first, as you say, jumped Yogi?

A Well, I started trying to help him out.

Q Well, how?

A Well, I tried, you know, to keep the guy off of him.

Q Okay. Can you describe what these people were doing?

A Well, the other two, I couldn't see that good, but the one that was in front of me, you know, he was, you know, sticking him.

Q Do you see any of the three people that were there jumping Yogi in the courtroom here today?

[587] A Well, there was two that was there, but I didn't see them stick him.

Q Okay.

A The third one --

Q Okay. At this point I'm just asking you who was there among the three that you saw that's in the courtroom today, if anybody.

A There's two there. One on each end that were standing there.

Q These two defendants over here that are on the ends of the row?

A Yeah.

MR. McGILLIVRAY: For the record, your Honor, indicating defendants Mata and Gallegos.

THE COURT: Yes.

MR. McGILLIVRAY: Q Are you saying that you didn't see either one of those two actually stabbing anybody?

A No. I didn't see them. The only one I did see was the other guy.

Q Okay.

A Cause I was standing right in front of him.

Q What did you see the other guy doing?

A Well, I seen him stick him once.

Q Did you see a knife?

A Yeah.

Q Can you describe it for us?

[588] A It's pretty long.

Q I'll show you what we have had marked as Exhibit Number 8. Can you see that?

A Mm hm.

Q Does that appear to resemble the weapon that you saw in that man's hand?

A Yeah.

Q Okay. You can't be sure this is the identical one, I assume.

A No.

MR. SIMRIN: Your Honor, I believe that might be number 9.

MR. McGILLIVRAY: My list might be wrong.

MR. McGILLIVRAY: The Clerk say seven.

MR. SIMRIN: I'm sorry. Number 7?

MR. McGILLIVRAY: So we're both wrong. Exhibit Number 7 is what I just showed the witness. Put it away.

[595] Q I'm asking you about before. Were you familiar with any of them in any way before Yogi got stabbed?

A Biggs. I was in Dorm 5 for a while.

Q You were in Dorm 5 for a while?

A Yes.

Q Which one is Biggs?

A The one in the yellow shirt.

Q Did you just see him there, or were you friends with him, or what?

A No, he lived in the dorm.

* * *

Q The first time the pictures were shown to you, were you able to identify anybody?

[596] A No, they were pretty old.

[612] Q Were there people in this aisleway between where you were walking and the doorway? Did you notice people in that area?

A I noticed people coming out and going into the TV room.

Q You didn't pay any special attention to them?

A No, I just kept going.

Q Were you looking in the direction of the exit door?

A Yeah, glancing up and buttoning my jacket as we walked off.

[614] Q Were you looking at that man with the big knife?

A Yes, I was looking at him.

Q You got a good look at that man?

A Yeah, I seen him.

Q And he pretty well occupied your attention from then on, didn't he?

A That's right.

Q And were you just looking at the knife, or did you get a good look at his face, too?

A No, I was looking at the knife.

Q And you were looking at his face?

A You know, I was just worrying about keeping from getting myself killed.

[617] Q So all you really saw of the fight was when this third man -- the man that is not here in the courtroom -- came at you with this big knife?

A Yeah.

[621] Q Can you tell us what these three people that attacked Mr. Arias were wearing?

A They had their state clothes on, you know.

Q And by "state clothes", do you mean blue denim clothes?

A Yeah, the ones they give you.

Q Did any of them have mustaches?

A Yeah.

Q Which ones had mustaches?

A All three of them did.

Q And what about hats? Were any of them wearing hats?

A Their beany caps.

Q By "beany caps", so you mean the blue knit caps?

A Yeah.

Q How many of those were wearing beany caps?

[622] A All of them, I think.

Q Did any of them have anything on their hands?

A Gloves.

Q Were the gloves state issue?

A A lot of people have them.

Q They are not issued by the state then?

A No.

Q Do you know what color these gloves were you saw on these people's hands?

A No, it was just that they had gloves on.

[623] Q Did you ever tell anybody that you saw the third man?

A No, I just, you know, kept it to myself.

Q Now, you were making identification so why did you keep it to yourself?

A I mean, what good would it do me to tell anybody?

Q Well, you identified three people as being involved, and was there some reason you kept that name to yourself?

A Well, I thought the third guy was him. He looks just like the guy except he's taller. I made a mistake.

Q He looks like who?

A The third man.

Q He looks somewhat like Mr. Vargas?

A The middle man? I that Mr. Vargas?

MR. MCGILLIVRAY: I can't hear the answers.

THE COURT: He said "middle man", "Is that Mr. Vargas?"

THE WITNESS: Yeah, well, he looks like him.

Q (By Mr. McGillivray) Except you say he is taller? Is that right?

[638] Q Did you know that Mr. Arias was going to be coming to Tehachapi?

A Yeah, I knew he was coming down.

Q You knew it ahead of time?

A Yeah, it was talk, you know.

[650] Q Now, when you were telling the correctional officers, the Sheriff's officers that you couldn't identify anybody, and they showed you pictures that you couldn't identify, and you couldn't identify anybody, were you telling the truth to them, or were you just trying to not get involved?

A Just trying to not get involved.

Q When you finally identified three people from pictures, like you told us before, were you at that time doing your honest best to identify the people who actually were involved?

A Yes, sir.

Q Did the correctional officers or the Sheriff's officers try to tell you or

attempt to tell you in any way who you should identify?

A No. They just had a bunch of pictures laid out.

Q About how many pictures would you say there were?

A About a dozen, I guess.

Q. Thank you. That's all.

[667] ALBERT MILLS, called, sworn and examined as a witness, testifies as follows:

[675] Q (By Mr. McGillivray) Would you proceed to tell us what transpired when Mr. Childress contacted you?

A He said he had been a witness to the killing in Dorm 8, and that he was fearful of his life.

Q Now, after he advised you of this, what action, if anything, did you take regarding what he did tell you?

A I took him from the sergeant's office into the lieutenant's office, and

called an officer to stay with him. I continued asking him questions concerning his fear; if he felt it was sound, and he said that he thought that probably he would not be left as a witness. He was fearful that those involved in it would also kill him.

Q Did you take any action to provide for his safety?

A Yes. It was shortly prior to the feeding of the institution. We had a count going at that time. While the inmates were off the yard, I took him through the sally port in control, and around the front of the institution to the investigation office.

Q That is the portion of the institution where inmates don't have a free run of the place, so to speak?

A Yes.

Q Once you got him there, did you make any efforts to obtain identification from him as to who had perpetrated the stabbing?

A I asked him if he could and if he would identify the people, and he said he knew some of them, but he didn't know one of those names, and he would identify them.

Q Did he indicate the names of any of them he did know?

[676] A Yes.

Q What did he indicate?

A He said he knew Mata and Gallegos, and the other one --

Q I'm sorry. I assume the other one he didn't know his name?

A He said he could identify him. He knew him on sight, and thought he live in Dorm 5 or 6.

Q What action did you take then?

A I got a Rollodex, which is a picture description of all the inmates in that particular facility, and I pulled --

Q And in what particular facility?

A The medium unit.

MR. MCGILLIVRAY: Go ahead.

THE WITNESS: I took the pictures of Gallegos and Mata out of it, and he said those were two of the people that were involved.

Q (By Mr. McGillivray) Did you do anything in attempting to get an identification of who the third person involved was?

A Yes. I sent for the dorm cards from Dorm 5, which is a record of daily activities, more or less, of the inmates in the units, but it includes a photograph of each inmate in that unit.

Q Is there an individual card for each individual inmate?

A Yes.

Q Were they brought to the office you were in?

A They were brought to the investigation office, yes.

Q Would you describe what procedure you followed with the photographs that were brought there?

[677] A They were given to Childress to look at. He picked Mata's picture from that group as one of the participants, which he had already previously done, but he said the other man was not in that group.

Q Did you take any further action then after he told you that?

A Yes. I got the dorm card from Dorm 6, and had him go through those.

Q What happened when he went through those?

A And from those he picked the picture of Vargas.

Q Now, are these dorm cards with the photos that you are referring to -- are they rotated or changed as the inmate population changes?

A Yes, they are kept current. If an inmate is transferred or moves to another unit or another institution, the card does with him.

[681] Q You said that Mr. Childress named Mr. Mata and Mr. Gallegos?

A Yes.

Q You said he didn't know the other?

A He knew him on sight.

Q And I believe you said you went and got this Rollodex of pictures?

A Yes.

Q And you pulled out the pictures of Mata and Gallegos?

A Yes.

Q And showed them to him?

A Yes.

Q And asked him if those were the two?

A Yes.

Q Mr. Mills, why didn't you show him the whole Rollodex without picking out those two first?

A It contained approximately six hundred photographs. He knew these people by name, and the other by sight.

Q That was what he had told you?

A Yes.

Q After the showing him of the roll of pictures, how many pictures did you show him next?

A Approximately seventy other photographs in Dorm 7 or Dorm 5.

Q You were showing his pictures according to dorm?

A Yes.

Q And from Dorm 5, he picked two?

A He picked Mata and said he had previously seen him.

[682] Q Did you show him any other dorm group?

A Yes. After he was unable to identify the third party from that group, I showed him the photographs from Dorm 6.

Q Did he make any identifications from that group?

A Yes.

Q Whose pictures did he pull out there?

A Vargas.

Q Did he ever pick out Gallegos's picture?

A It was placed with the group of photographs, and he picked all three of the photographs from this group.

Q When was that group showed to him?

A Immediately following the time that he picked out Vargas. Gallegos was still in the Rollodex, and I gave him that photograph.

Q How many pictures were in the group that you showed him?

A I showed him actually two groups of pictures. Dorm 5, he was able to choose but one, which was Mata. In Dorm 6, he chose Vargas. I took all those pictures from Dorm 6, inserted the photograph of Mata and Gallegos, added several others, and had him go through those.

Q This is after you had already pulled out the two pictures from the Rollodex?

A Yes.

[688] Q And then you say at that point you went and got the pictures from Dorm 5, and asked him to make an identification from Dorm 5?

A Yes.

Q Was there any reason that you did that?

A He indicated that the other participants had lived in either Dorm 5 or Dorm 6.

Q He didn't tell you that both of them lived in --that two people lived in Dorm 6?

A No.

Q He didn't have a discussion with you -- you didn't bring him a batch of pictures from Dorm 6 at first, and let him look through those, and Mr. Childress failed to make an identification from those Dorm 6 photographs?

A No, sir.

Q You didn't have any discussion with him about, after he was looking through some

pictures, what he really meant was Dorm 5 and not Dorm 6?

A No.

Q He never described what dorm he meant in terms of geography of the institution?

A No.

[693] Q Now, Mr. Childress has testified in this trial that at the time that he came in to see you, he didn't know any of these people's last names. Is that according to your recollection of what it was?

A No, sir, it isn't.

Q And it is your recollection that he also identified Mr. Mata as "Mata"?

A Yes.

Q And it is your recollection that he knew the last name at that time?

[694] A As I recall, yes.

Q Now, you testified earlier that Mr. Childress picked out several photographs from the Rolodex. Isn't it a fact that you picked

out the photographs from the Rollodex and showed them to Mr. Childress? That's what he testified to, and not your previous statement.

A Yes.

Q In other words, he didn't pick out photographs from the Rollodex?

A Correct.

[707] ROBERT E. KING, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

[711] Q Did he make any positive identification of anyone at that time?

A Yes, he made what we considered a positive identification in that he gave us a name of an inmate who had supposedly, he reported, been identified to him by other inmates.

Q What name did he give you?

A He gave us "Bogus" Pete Nunez.

[713] A I told Mr. Almengor that "Bogus" Pete Nunez could not have been involved in

the incident since we knew that he was outside the security area on a work detail at the time of the incident.

[714] THE CLERK: People's Exhibit 23 for identification.

Q (By Mr. McGillivray) After the twenty-four or twenty-five photographs that you used -- let me back up. After you used those twenty-four or twenty-five photographs that you have mentioned to us, did you retain them in your custody or turn them over to somebody?

A I turned them over to Investigator Higgins.

Q I show you Exhibit 23 for identification, which is a reproduction of twenty-four different mug shots? Is that correct?

A That is correct.

Q As best you can recall, do those appear to be the photographs you used on the 27th to show Mr. Almengor?

A Yes, they appear to be the same ones.

Q Are the three defendants in this case seated over on the other side of the courtroom portrayed in any three of these photographs?

A Yes, they are.

Q Would you take this marking pencil -- well, let's just [715] put an "X" under the photos of each of the three defendants.

(Witness indicates.)

Q Now, were these photographs that were taken within a week, say, of the time you showed that to Mr. Almengor, or were they older?

A There's no way of knowing when they were actually taken. They were standard mug shots taken when the inmate is brought to the institution. They could have been taken at various times, but they were not taken specifically or recently, to my knowledge.

Q You didn't make any special effort on that occasion to get brand new photographs of all of these inmates, did you?

A No, I did not.

Q When Mr. Almengor was shown those photographs, was there any identifying marks on the front of them he could see, such as the name of the inmate, or a date, or anything like that?

A They were marked, but we covered up the markings.

Q How did you cover them?

A Laid another photograph on top of another until the last row, and then we covered that with paper.

Q So they overlapped where any identification was?

A That's right.

Q Did Mr. Arias [sic] pick any photographs out of that as either being positively one of the assailants or possibly one of the assailants?

A He possibly identified Inmate Vargas, but it wasn't a positive identification.

Q And did he make any request concerning a better [717] opportunity to observe pictures of people?

A Yes, he said he felt the photographs we were showing him were too old; that the appearance may have changed; and he requested some later up-to-date photographs.

Q Now, did you make any efforts to obtain some later photographs?

A Yes, we did.

Q Would you describe what you did in this regard?

A The first attempt, we had a number of inmates photographed. However, they did not come out due to a mistake by our photographer.

Q Who was your photographer?

A I don't recall his name.

Q Was he a professional photographer or an inmate photographer?

A An inmate photographer.

Q And what happened after the first attempt didn't work?

A We then had the defendants photographed, and we took other photographs, and had them reproduced to the same size.

Q On October 30th, 1972, did you show those photographs -- those new ones and the other ones you have just described to us -- to Mr. Almengor?

A Yes, I did.

Q Was anybody from the Sheriff's Office present with you on that occasion?

A No, there wasn't.

Q Approximately how many photographs did you show on that occasion altogether?

[717] A I believe there were fifteen.

THE CLERK: People's Exhibit 24 for identification.

Q (By Mr. McGillivray) Again, when you finished using those fifteen photographs in your part of the investigation, did you turn those over to Investigator Higgins?

A I did.

Q Showing you Exhibit 24 for identification, which is a photographic reproduction of fifteen different mug shots, do those appear to be the photographs you used on October 30th with Mr. Almengor?

A They do.

Q The three defendants are included in this exhibit?

A Yes, they are.

Q Would you take the marking pencil again and put a "X" under the photo of each defendant?

(Witness so indicates.)

Q On this occasion, first of all, those photos as they are pictures in Exhibit 24, they have the names and dates on the bottom of them? Is that correct?

A That is correct.

Q Did you do anything to conceal that information from Mr. Almengor when you showed the photographs to him?

A Yes, I did. I used the same method I had used before -- overlapped the photographs, and covered the last row with paper.

Q The only thing that was visible to Mr. Almengor was the actual faces, themselves, in the photos?

A That is correct.

Q Did Mr. Almengor pick any of those photos out as being [718] photos of any of the assailants of Mr. Arias?

A Yes.

Q Which one did he pick out?

A He picked Gallegos, Vargas, and Mata.

Q Did he qualify his identification in any way as saying they were just possible instead of positive?

A No, he did not.

Q Did you take a statement from him when he made that identification?

A Yes, I took a taped statement.

[719] I would like now to turn to the contacts you had with J. Allen. Did you have a contact with him concerning possible identification of the assailants in this case on October 19th, the day of the killing?

A Yes, I did.

Q Do you recall approximately what time of the day or night it was that you contacted him about this case on that occasion?

A I'm not sure of the exact time. It was late in the afternoon or during the night.

Q Was Investigator Higgins from the Sheriff's Office with you on that occasion?

A Yes, he was.

Q Now, on that occasion, was Mr. Allen asked if he could make an identification of any of the assailants?

[720] Q Now, when you showed those to Mr. Allen, did he identify anyone from those pictures?

A No, he did not.

Q Can you tell us, as best you can recall, what he had to say, if anything, about identifying some of those photos?

A As I recall, he stated he couldn't identify anybody from those photographs; that they appeared to be old photographs.

Q Now, you told us that you saw and talked to both Mr. Allen and Mr. Almengor on the twenty-seventh. Did you see them both at the same time, or were these separate interviews?

A I talked to them separately, and together.

Q Okay. Was Mr. Allen present on the occasion of the twenty-seventh when Mr. Almengor tentatively or possible identified the photo of Inmate Vargas: Do you understand my question?

A On that occasion, he wasn't present.

Q I would like to direct your attention to October 30th, and ask you if you contacted Inmate Allen again on that day?

A Yes, I did.

Q Was anyone from the Sheriff's Office with you on that occasion?

A No.

Q Did you show any photographs to Mr. Allen on that day?

A Yes, I did show him some.

Q Referring you to Exhibit 24, which is a group of fifteen photographs in front of you, is that the group of photos that was showed Mr. Allen?

A Yes, it is.

[722] Q Again, did you follow the same procedure of covering up the identification on the photographs before you showed them to him.?

A That is correct.

Q You have already told us you showed those to Mr. Almengor on that day. Would you describe chronologically how you did it? Who went first? Just the procedure you followed?

MR. LANIER: Excuse me. Which day is this?

MR. MCGILLIVRAY: The 30th of October.

THE WITNESS: Yes. I had Almengor brought to my office, and had the photographs laid out on the desk with the identification covered; showed them to him, and he identified the three defendants. I then had Mr. Allen brought to my office. Almengor walked up to the table, and identified the same three defendants.

Q (By Mr. McGillivray) Was there any conversation before Mr. Allen's identification between himself and Mr. Almengor?

A No, there wasn't.

Q Did you or anyone in your presence advise Mr. Allen that Mr. Almengor had identified these three defendants?

A No, there wasn't.

Q Was the taped statement that you took from Mr. Almengor, which we have marked as "Exhibit 25", taken before Mr. Allen was brought into the room?

A Yes, it was.

Q When Mr. J. Allen identified the same three photographs, these three defendants, did you take a taped statement from him?

[723] A Yes, we did.

[733] Q Now, on October the 19th, did your report reflect that Mr. Almengor positively identified "Bogus" Pete as one of the assailants?

A Yes, it does.

Q And that he made that positive identification of "Bogus" Pete after he looked at photographs?

A It doesn't reflect that this -- he did look at the photographs. However, the identification that he made was not made

directly from looking at a photograph, no.

Q But your report indicates, does it not, that he positively identified "Bogus" Pete after looking at the photographs?

A Yes, it does.

Q And that at the same time, after looking at the photographs, he tentatively identified Mr. Vargas?

A That's true.

[734] Q After he made that identification, wasn't he advised by you or some other authority in your presence that "Bogus" Pete was out of the facility at the time of the killing?

A That's true.

Q At that point he said, "Let's look at some more pictures"? Is that right?

A True.

Q And he looked at some more pictures, and then he identified again, tentatively, Mr. Ramirez and Reymundo? Is that correct?

A That is correct.

Q Those were the only ones he picked out that day? Isn't that true? Just those four?

A Four, yes.

Q Not eight or twelve, sixteen, but just four?

A As far as I recall, he narrowed it down to four possible.

[738] "Interview of Inmate Almengor, prisoner housed at the California Correctional Institution at Tehachapi. Present during this interview is Sergeant William McCaslin, Officer Walter Lomas, and Lieutenant Robert King. This interview is being conducted in regard to the stabbing of Inmate Arias on October 19, 1971. The [739] time is 6:35 P.M. The place is the investigator's office, medium facility, California Correctional Institution.

Q (By Mr. King) Okay, Mr. Almengor. We've discussed this case on two or three

separate occasions prior to this interview? Is that correct?

A Yes, we did.

Q Okay. The first time I talked to you was on the evening of the incident, on the evening of the 19th of October?

A Yes, sir. That's correct.

Q All right. And at that time we were in the lieutenant's office in the medium facility? Is that correct?

A Yes.

Q And that's where we, uh, searched you, and checked you for bloodstains, took hair samples and other, uh -- we had some conversation at that time? Is that right?

A Yes.

Q Okay. And then a little later on that evening I, along with the Sheriff's investigators, talked to you some more? Is that right?

A Yes, uh-huh.

Q And during that conversation, we showed you a group of -- well, we showed you numerous photographs? Is that correct?

A Yes.

Q Probably a couple of hundred or better? Is that right?

A About four or five hundred different photographs.

Q All right. And when you looked at those photographs, you said you could not be absolutely sure of identifying anybody, is that correct, at that time?

[740] A Yes, uh-huh. Not the little, small photographs because they didn't look like, uh, up-to-date, you know photographs. In other words, they had haircuts, and they looked different, and they might have been at least a year or two years old -- them photographs.

Q All right. So you felt because the people you were trying to identify were not

clearly represented by those photographs? Is that right?

A Yes.

Q So you did not positively identify anybody at that time?

A No.

Q Okay. And then on October 27th, I again had occasion to discuss this case with you along with Officer Higgins of the Sheriff's Department? Is that correct?

A Yes.

Q And at that time you were shown another group of photographs? Is that correct?

A Yes, that was another, I would say about, fifteen, twenty photographs.

Q Okay. And those were the same type of photographs, is that correct, as you had been shown before?

A Yes, they were.

Q And did you tell us at that time that you could not positively identify

anybody from those photographs because you felt they didn't represent the people as they are now?

A Yes.

Q And did you say that, uh, one of those reasons was [741] because some of the people now have mustaches and long hair, and had changed in other ways, uh, and no longer looked as they did when those photographs were taken?

A Yes, that is correct.

Q All right. Now, I have just shown you a group of fifteen photographs. You have indicated that you can identify three people from this group of fifteen photographs? Is that correct?

A Yes.

Q Now, these are recent photographs that have been taken that show the people as they are currently -- with mustaches, long hair, and so on? Is that right?

A Yes.

Q All right now. As we went through these photographs, you identified three different inmates? Is that picture I'm showing you one of those that you have identified?

A Yes, it is.

Q Okay. This is Vargas, B-35042. And this photograph, is this one you identified?

A Yes, it is. That one right there, too.

Q Okay. This is R. Mata, M-a-t-a, B-23991. And here's a third photograph. Is this one you have also picked out of this group?

A Yes, that one, too.

Q This is D. Gallegos, G-a-l-l-e-g-o-s, B-39506. All right, Mr. Almengor, now, would you -- would you tell me in your own words why you picked those three people from that group of photographs, and what significance

they have in relation with [742] this investigation?

A Well, I could recognize, you know, one of them correctly, you know.

Q You mean before out of these other photographs?

A Yes.

Q Which one was that that you --

A It was Vargas.

Q You had previously recognized and identified Vargas as being one of the attackers of Arias? Is that right?

A Yes, sir.

Q Okay. Go ahead.

A And the other one, which is this one right here --

Q That's Mata?

A Mata, yes. I could recognize him also because of the reason that he was facing toward -- he was facing -- he was looking at me eye to eye, you know, at the time of the

stabbing when he backed up. We stood there several minutes, you know, seconds, I guess, you know, as you call it, looking at one another. That's why I could identify him.

Q All right. And how about the third -- third person, Gallegos?

A Gallegos (pause), Gallegos, him -- well, I identify him because, uh, more or less, uh, there's no, uh, there's no other one who looks like Gallegos there, and I'm pretty sure that he's the third person, which I didn't take a look at him very well except from his sideview and his back, and I didn't get to see correctly, you know, straight mug shot from frontwards, and plus, uh, he's, uh, he fit the other party in size [743] and everything, you know, because I've seen him, too in person.

Q So you feel certain in your own mind that Gallegos was the third person --

A Was the third person.

Q -- during the attack on Arias?

A Yes, I do.

Q All right. Now, you know that this conversation is being tape-recorded? Is that correct?

A Yes.

Q And you have indicated to me and to other officers from the Kern County Sheriff's Office that you intend to testify in court, if necessary, as to the things that you are telling us now?

A Yes, I do.

Q And that you know that you would be required to testify under oath?

A Yes, uh-huh.

Q If you are ever called to court as a witness?

A Yes, I know all this. I'm aware of all this.

Q And you are aware of the penalties if you do not tell the truth or if you

falsely identify somebody, knowingly falsely identify somebody? Is that correct?

A Yes, uh-huh.

Q Okay. Why don't we go back to the day of the attack, and just in your own words tell me what happened and what you saw that day?

A What I saw? Well, I'll start out when it actually started, you know.

[744] Q All right. Do you remember what time that was?

A It was about two o'clock.

Q In the afternoon?

A Or it could have been 1:30, you know, in the afternoon because I had already reported to work, and I report to work at 1:00, at least. I'm working grounds crews, and I had already cleaned up my area, and came home to my dorm, which was Dorm 8, and as I went in there, I stood there awhile. So I guess it would be about 1:30 when everything started moving, you know.

Q What do you mean "everything started moving"?

A You know, like, uh, you know I got to know this man, you know, that got stabbed, you know, and I went over to a friend of mine's bed, you know, because he asked me -- he called me over there, and asked me for some coffee. And there was another inmate there which wasn't in our dorm, and I got introduced to him, and then he told me that he had barely arrived, and he --

Q Who was this other inmate? Did --

A The other inmate was the inmate that got stabbed.

Q Did they tell you his name at that time?

A Yes, they toldme his name, but, you know, I more or less forgot it, you know. See, I only know -- see, they told me the name of, you know, what he's called, you know, and which was "Yogi". That's all.

Q Yogi?

A Yes, they called his name "Yogi", and, uh, I offered him the coffee, and they were talking about the streets the time when I was there, you know, about, you know, what times they had [745] each other in the streets, when they were in the streets, you know, what times they had, you know, and then I went back to my bunk, and I got my glasses, and I was going to the TV area. And at that time when I was getting my glasses, they called "All new arrivals", you know, "report to the laundry and pick up your issue" -- the laundry issue because that night, the night before that, I mean, you know, when that bus drove up, it drove up at night time.

Q That night before the incident? Is that correct?

A Yes, and that night it was raining, and they didn't issue out, you know, them all their laundry issue. So the next day, that's

why they called laundry issued about 2:00, you could say about 1:45, somewhere around there. So then they get up, and at that time I'm already there over to their bed because they slept much closer to the office than I did. And so I catched them up, not quite all the way up to where they're at, you know. They are already by the water faucet, and I'm catching them up already, and they turn around, and they tell me, "Do you want to go to the laundry room with us?" And I look at them, and I tell them, "Well, I guess it's all right, you know. I was just going to look at TV". So I tag along with them right there, and as we started to step out, there is three, you know, three, uh, three persons -- three other inmates that don't belong in the dorm standing there at the bulletin board looking at the roster sheet and the movement sheet, and all that, pretending like they're looking at it. Two of them are pretending

like they are reading it, and the other of them gots hs arm on top of the little wall that comes right there to separate them from the little aisle [746] they were by.

Q Would that be by Bed No. 1? The little wall by Bed No. 1?

A Yes, sir. And he has one hand, which is his left hand, on the wall, and one hand he's got in his coat. And I noticed that all of them were wearing black gloves, you know, and they start turning around fast, as soon as we, you know, get up real close to them. I'm still, you know, like, say, about two steps behind, you know, these other guys, because I'm, you know, going to catch them up and going to walk right beside them. They turn around, and they just go directly at one of the -- at that other guy that was walking there that didn't belong in our dorm, which was the one that got stabbed by the name of "Yogi". They just attacked him -- two of

them. The other ones go to attack him, too, but when he sees that I, you know, am catching up, and that I continue walking, so he attempts to me, you know, and at this time I'm looking at all this, and they're already stabbing him -- the one by the wall was stabbing him in the back, you know.

Q All right, now. Who was doing -- who was next to the wall that you referred to as doing the stabbing?

A The one next to the was was Vargas.

Q Vargas.

A Yes. And the one that was in front of him, stabbing him from the front -- Vargas was stabbing him from the back and the side of the neck, which I got to see, and I seen this other one, which is this one --

Q Gallegos?

A Yes, which I didn't see his face, you know, in a direct, [747] you know, look forward because he was facing them and, like,

with his head down, you know, and he was like sticking him in the stomach, you know, with a smaller knife, which I did get to see when he drew it back, and then later on, you know, I turned back to this other guy, you know.

Q Which other guy are you talking about? Mata?

A Yeah, which is Mata, and Mata's standing right in front of me. And Mata looked at me, and I continued walking, you know, coming more nearer to the thing that's taking place -- the stabbing. So he attacks me, you know, thinking that, you know, I'm going to help out there, you know.

Q Now, does he attack you with a weapon or with his hands, or what?

A No, with the weapon. He had a knife in his hand, and he had it in his right hand, and he comes forward towards me, like throwing two swings, you know, and so I see him, and right away, you, I -- my reflexes

just, you know, move me towards him, you know, and I just get into a fight with him right there, you know, and I throw a kick at him, and I exchange about three or four, you know, different swings with him, and he backs off, you know, because I guess he sees that he's not going to, you know, get to me. So he backs off, and he stays looking at me, and I stay looking at him, and I turned back and looked at the stabbing, which while me and him were, you know, fighting, I heard a jingling noice like a drop, you know, like, you know, some money, you know, noise, or something like an aluminum object, or something. And when I turned around to see, you know, the stabbing, I seen a knife on the floor, and I seen J. Allen, which [748] was the other inmate that was beside him, beside Yogi, you know, helping him down towards the floor, and the stabbing was already, like, you know --

Q He was helping Yogi towards the floor, you mean?

A Yes, uh-huh, because Yogi was falling. So he attended to him, and put him down on the floor, you know, laid him down, you know, and when he laid him down, Mata, right there, you know, he wasn't doing nothing no more. He was just looking at me making sure that I wasn't, you know, attacking him, you know. Now, all he was doing was, like, uh, keeping me out of it, you know. and I just looked at him, and I see -- and I see one of the knives on the floor, which was the knife that this one --

Q Gallegos?

A Gallegos, yes, had broke, because as, you know, as soon as the noise fell on the floor, I turned around and Gallegos, you know, no longer had a knife in his hand, and he's the only one that could have had that knife that broke off, you know, or fell out of his hand.

Q Uh-huh.

A And that's how it happened, and they they just turned around, which is this one, Mata -- he turned around, and he went outside, and the others, you know, turned around, and they followed right behind, but I saw this one right here --

Q Vargas?

A Vargas was the last to leave, you know, to go ouside the door. And that was the last I seen of them.

Q Now, as far as what you saw there that day, then Mata was completely occupied with you?

[749] A Yes.

Q Did you see him actually stabbing the victim at all?

A No, sir. I didn't see Mata stab the -- I seen Mata. He was going to attempt to it, but when he seen me coming, you know, he backed off, and he came at me instead.

Q And then he was involved with sparring with you? Is that correct?

A Yes, uh-huh.

Q But now, did you see any of the other two actually stab Arias? Did you actually see them stabbing with the weapon?

A Yes, which is Vargas and the other man right here, Gallegos.

Q Did you see the weapons in their hands?

A Yes, I seen the weapons in their hands.

Q Did you get a good enough look at them to tell what they looked like? Were they both the same, or were they differentz?

A No, they were different, you know. The one, Vargas, was long, you know, and bigger, like, you know, more or less a big pointed object, you know, filed down, like a long knife. Thin, you know, and long. And this one right here -- Gallegos -- he had a

small one. I'd say about five inches long, only it wasn't that pointed or sharp.

Q Now, did you say that Gallegos was behind -- was in front of the victim?

A Yes.

Q Stabbing towards the midsection -- stomach area?

A Yes, uh-huh.

[750] Q And that Vargas was behind the victim, stabbing into the back area?

A Not exactly all the way behind him directly, you know, like in the side of him, like in the side of his left hand, you know, right next to him, like facing him in the side, you know, and from there, you know, he just had his hand to his side, and he was stabbing. He stabbed him in the back, and he stabbed him in the front, you know, which was in the neck, you know, and that's all I got to see where he stabbed him thre two times right there with the long knife.

Q Did you know any of these three prior to that incident? Did you -- were you friends with them, or did you know them personally prior to that date?

A I never talked to none of these inmates, and I never knew them as long as I been on this side of the institution.

[751] Q All right, now. Has anybody promised you anything since you've been in segregation?

A No, sir, I'm doing all this volunteerly.

Q All right. Has anybody threatened you?

A No, sir.

[752] LIEUTENANT KING: All right. This interview is terminated at 7:05 P.M., October 30, 1972."

[793] "This is Lieutenant King at the California Correctional Institution at Tehachapi. I'm tape recording an interview

with Jay Allen, N-35235. Mr. Allen is an inmate housed at the California Correctional Institution at Tehachapi. The date is October 30, 1971. The time is 7:30 P.M. Present during this interview is Sergeant William McCaslin, Officer Robert Lomas, Inmate Almengor, Inmate Jay Allen, and myself, Lieutenant King. The place is the investogator's office, medium unit, C.C.I.

This interview is in regards to the fatal stabbing of Inmate Arias, A-r-i-a-s, on October 19, 1972, in the Medium Facility, C.C.I, Tehachapi.

Q. BY LIEUTENANT KING: Okay, Jay, I've shown you a group of fifteen photographs, mug shots, taken at the institution here [794] at Tehachapi. Now, you have chose three of these photographs, and have stated to me the three people you have chosen were the people who attacked Inmate Arias on October 19? Is that correct?

A Yes.

Q All right. I'm showing you one photograph now. Is this one of the three that you identified?

A Yes.

Q This is Gallegos, G-a-l-l-e-g-o-s, No. B-39506. All right. Here is another photograph. Is this one of the three you have chosen?

A Yes.

Q This is Vargas. V-a-r-g-a-s, B-No. 35402. Here is a third photograph. Is that the one you have identified?

A Yes.

Q This is R. Mata, B-No. 23991.

Now, Jay, on October the 27th, you were interviewed by myself and Investigator Jim Higgins of the Kern County Sheriff's Department, and at that time they showed you a group of photographs, and you stated at that time you could not be sure of the

identification; you stated at that time that the photographs were old and some of the people had changed and no longer looked the same due to mustaches, long hair, and so on? Is that correct?

A Yes.

Q Now, the photographs that you see before you are photographs of inmates as they appear now. These are recently taken photographs, and you now state that you can identify these three persons as being the ones that attacked Inmate Arias on the 19th of October? Is that correct?

[795] A That's right.

Q All right. Why don't you tell me in your own words what happened and what you saw and heard that day -- the day of the incident, October the 19th; where you were at, and what you saw?

A We were in my bunk area, drinking coffee, and --

Q Where is your bunk area? Where are you housed?

A Dorm 8.

Q What is your bed number?

A Bed 78.

Q Bed 78 in Dorm? All right. Go ahead.

A We were talking, and we hear an announcement over the speaker, you know, to go down and get his property. So we got up and started to go with him -- me and --

Q You say "with him"? Who are you referring to as "him"?

A Yogi.

Q Yogi? That would be Arias?

A Arias.

Q All right.

A And Rigo was with us, and we started walking out, and there was three guys standing by the doorway, and we walked up to them, and that's when they stabbed him.

Q Okay. Now, did you see three of these people that you have identified actually stab Yogi, or what did you actually see?

A Well, the guy who was standing where I was standing at, that would be on the left-hand side of Yogi -- well, I seen him grab him --

[796] Q Which on would that be?

A This one.

Q Vargas? You saw Vargas grab Arias?

A Yeah.

Q And Vargas was on which side?

A They all grabbed him at the same time.

Q All three of them?

A You know, this guy here had his arm, you know, on -- like, see, he was standing with his face toward us, and, like, he grabbed him with his left hand, pulled his shoulder down, and swinged at him the knife.

Q And did you see the knife?

A I didn't see it until it came out.

Q But you saw him swing at Arias?

A Yes, I seen him swing.

Q And then you saw the knife as he withdrew his hand?

A Yeah, when the knife came out, that's when I knew what was going on, and that's when I went in at him, and he let loose of him, and that's when he came at me, you know.

Q And he struck at you with the knife?

A Yeah.

Q Vargas did?

A Ans so I kept backing up, and making as much noise as possible to get people to come up there, you know. I knew if I could draw enough attention, you know, I knew that this would scare him off, you know. I turned and seen Rigo. He was fighting with one.

Q Which one did you see Rigo fighting with? Do you know? [797] Could you recognize him, or just --

A I don't know. I think maybe it was this guy right here because it was this guy who was standing in the middle. No.

Q You couldn't be sure then who was fighting with Rigo? Is that right?

A I don't know.

Q Just one of the three?

A You know, it was one of these two. I don't know which one it was.

Q All right.

A So I just kept backing up, and this guy came at me.

Q And you saw -- you said they all three grabbed him, grabbed Arias initially?

A They all struck him.

Q And they all struck him? Did you see weapons in the hands of the other two?

A Yeah, they had knives.

Q What did you see? Did you see -- Could you identify the weapons, or were they just flashes, or what? What were they?

A Yeah, they were just, you know, quick flashes, and I just (slap) (slap), you know.

Q You indicate that you could hear a slapping noise or a hitting sound?

A Yes, they were sticking him.

Q All right. And then after Vargas swung at you with the knife and you backed up, then what happened?

A Well, I turned around and hollered for the officer. He was down in the dorm someplace. And then I turned back around [798] and went at him again. That's when I grabbed Yogi and pulled him back, and that's when I held him, and that's when they headed through the door.

Q You pulled Yogi back and laid him down?

A Yeah, and then I went back to the door, because, you know, like I figured the guy wasn't green, you know. I mean, and all I could do was help back his play. The other guys had blades and shit! And so I went back to the door, and I couldn't see nobody there, and just seen a knife laying on the -- down below on the stairs, and I turned back around and I started helping him, and that's when everybody came and said for us to get back to our bunk areas.

[800] Q All right. Have we promised you anything or threatened you since you have been locked up?

A No, not I know of anyways.

Q All right. Now, the three people that you've identified here from these photographs, did you know them prior to this incident?

A Well, I had seen them before, but I didn't know them personally.

Q You weren't acquainted with them?

A No.

Q Did you know them by name?

A No.

Q Is tonight when I read those names off to you, is that the first time that you knew their names?

[801] A Yes.

Q And so then you have identified them strictly by sight from your encounter with them on the 19th and also from prior encounters in the yard? Seeing them on the yard and in the general population, you recognize them? Is that correct?

A Yes.

* * *

Q Okay. Now, the day of the incident, the day that Arias was stabbed, what was the visibility like? Could you see everything clearly? Was there plenty of light?

A It was daytime, a little after breakfast.

Q There was plenty of light in the dormitory so that you [802] could see who was there?

A Yeah, it -- there was no problem about seeing.

[805] CARLOS ORTEGA, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

[812] Q While you were at Tehachapi, did you have any part or play any part in getting any of these defendants into the Mexican Mafia?

A Yes, I did.

Q Which ones, and what did you do?

A I put in Robert Mata and David Gallegos.

Q What was your position in the Mafia group at Tehachapi?

A Chief.

Q Was that because you were the one who had been in longest up there?

A The longest, and I was there at first.

[823] A He [Mata] said Gus has told him that Yogi Bear was coming, and that he had stabbed Louie Valenzuela at San Quentin and thaty they wanted both of them to hit him, and I said no, that there was nothing going to come down unless I said so.

[828] Q Did you have any conversation with either one of either Mr. Mata or Mr. Gallegos at that time about Yogi?

A Yes. They were saying, 'Well, let's get down', you know, 'Let's get him', you know.

Q What does the term "get down" mean in prison language?

A Put and knife in your hand and do your thing.

Q And what did you reply, if anything?

A I told them, 'Hold your horses'.

Q All right. Did either one of them leave you position at that time?

A They -- Robert Mata gave like a funny look to David Gallegos, and he left.

Q In which direction did he head?

A To Dorm 5 and 6.

Q Did you see him go actually to the dorm or just go in that direction?

A Go in that direction.

Q Okay. Did you have any conversation with Mr. Gallegos after Mr. Mata left?

A We were talking, and he was talking about that he wanted to get down, you know, been waiting long enough.

Q Did you contine to try to --

A I told him to hold it down, you know. I told him to cool it, you know.

Q At any time when you were standing there, did Mr. Tiny Vargas come on the scene?

[829] A Yes. He came up.

Q Did he get there before or after Mr. Mata left?

A After.

Q All right.

A As he got here, he also stated, you know, 'Yeah, we've waited long enough', you know, and then David Gallegos left.

Q Which direction did he head?

A The same way that Robert Mata left.

Q Approximately how long were Mr. Mata and Mr. Gallegos gone?

A Approximately?

Q If you can make and educated guess or a rough estimate.

A Well, about ten minutes I would say.

Q Did Mr. Vargas stay with you during that time?

A Yes.

Q All right. Did Mr. Mata and Mr. Gallegos return together?

A Yes.

Q Okay. Did you have any conversation with Mr. Mata at that time?

A Yes. He had a knife under his -- right here, you know, under his --

Q Sleeve?

A Under his sleeve, and he had some gloves on.

[830] Q What color were the gloves?

A Black.

Q Did he actually show you the knife?

A Yeah. He went like that. He wanted to give it to me.

Q You are indicating that arm extended. Down into the palm?

A Yes.

Q Did he say he wanted to give it to you, or what?

A Yes.

Q Can you describe the knife for us?

A Well, I didn't get to see, you know, just the front where it looked kind of --

Q You're making up and down motions with your fingers. Sort of jagged?

A Yeah. There you go, yeah.

Q Let me -- I think it's Exhibit 7. Did the portion of it that you saw,

Mr. Ortega, look anything like any portion of that knife I'm holding in front of you, Exhibit 7?

A That's the same thing, the same one.

Q What part of it did you see?

A The front part.

Q The part I'm holding on to?

A No.

Q The pointed part?

A Yes, sir.

Q About how much of it did you see?

[831] A About that much.

Q Indicating four inches, five inches?

A Around there, yes.

Q Okay. Did you take the knife from him?

A No. I got scared. It told him I didn't want it.

Q Did Mr. Mata say anything to you about having any other weapons besides the one we just showed you?

A He said he had one right here inside his belt -- inside of his pants here.

Q You are indicating right below the chest area?

A Yes.

[941] "MR. HIGGINS: This is the tape recorded statement of Paul Childress, No. B-38822, inmate at the Department of Corrections in Tehachapi, in the Medium Security. This recording is regarding the death of Leonard Arias, A-r-i-a-s, that occurred on 10-19-72, in Dorm 8, Medium Security, at the prison in Tehachapi. This recording is being made at 16:38 hours, 10-27-72.

[947] Q Now, you knew the people you've just identified? You knew them by sight?

A Yeah, I knew tham all.

Q BY MR. HIGGINS: You knew all three of them by sight?

A By sight, yeah, uh-huh.

Q And I think on two, you told us earlier that you knew them by nicknames?

A Right.

Q This Mata, and you stated that he was nicknamed [948] "Biggs"?

A "Biggs", right.

Q And you knew this one by --

A By his first name.

Q David?

A David.

Q How were the lighting conditions?

A Lighting? -- it was about 1:30, quarter to two in the afternoon, excellent lighting.

Q It was a clear day?

A Yes, it was a clear day. It wasn't dark or nothing in the corner where all this happened.

[953] "MR. HIGGINS: This is the tape recorded statement of Rigoberto Almengor. This statement is being taken in the Investigation Room, Medium Security, at the Department of Corrections at Tehachapi. This

interview is regarding the deal the Leonard Arias, inmate, that occurred 10-19-72.

[957] A And so I went over there and offered him the coffee. And as I sat down, I got introduced to this other inmate that was supposed to get killed. And I went back to my bed after we exchanged a few words -- who he was, and what he was doing in Tehachapi. I went back to my bed, and got my glasses, and I was then going in the direction of the T.V. area, which he had already stood up. And I walked a few steps away from Allen's bed, and then while I was going to turn into the T.V. area, Allen turned around and invited me to go with them to the laundry because they said through the speakers that all new arrivals report to the laundry for their laundry issue.

And when they said this -- he was a new arrival -- so this is the reason they were going to the laundry. So I told them,

"yeah, I'll go with you guys". And I was on the right-hand side of the inmate that got killed. Well, as we were walking out the door, and I had about three more steps I take, and these guys made a fast movement turning around.

Q What guys? Explain where they were at.

A They were right by the door in a corner of the wall where the bulletin board is.

Q That would be just as you go out the door?

A Yes.

Q Is that correct? Did you know any of these prisoners?

A No, I didn't know them. At the time they were facing the bulletin board and the dorm.

Q BY MR. KING: How many people were you talking about that were there?

A I'm talking about three people. Two of them were [958] looking at the bulletin board, pretending like they were reading the papers in it, and one of them was looking towards the dorm, leaning up against the wall, with his chest, you know, toward -- with his arms up on top of the wall.

Q BY MR. HIGGINS: Did these people live in Dorm 8 -- the three that you saw there?

A No, sir. None of them lived in Dorm 8.

Q As you approached, explain to us where the victim, youself, and Allen -- how you were? What position you were in?

A All right. As he invites me, I move closer to the man that got killed, which I am on the right-hand side of him, on the side where the T.V. is at, T.V. door is at, against the office. And Allen's on the left-hand side of him, and the guy that got killed

was in the middle of us. And then we start walking out the door to go outside. The guy that got killed, he put his head down like he knows who these guys are. And as soon as we get up close to them, to the door, they turn around, and they pull their hands out of their coats, and they all have knives.

And they come directly at the guy that's in the middle. And one of the guys, you know, sidesteps -- this guy in the middle -- and grabs him, and stabs him in the back, which Allen at the time which was beside him, he took at least two steps back when he seen these guys turn around and seen the knives in their hands. The reason the guy in the middle didn't do this is because he was looking down at the floor going out.

Then, at that time, I turn around. I took about two steps back and as soon as I seen these guys turn around real fast with [959] these shiny objects in their hands, and

I looked directly at the guy that's stabbing him.

Q Let me stop you right there, Rigo. Now you say that you looked directly at the one who had the long knife and stabbed him? You told us this earlier. You were shown 22 photographs, and you selected this one here?

A That one.

Q As the one that is actually the long shank and stabbed him in the back, was in the center?

A Yes.

Q This is S. Vargas, B-35042? Okay. Have you been shown any photos prior to today?

A Yes, I've been shown quite a few.

Q Would you say possibly 150 to 200?

A Right now I've been shown at least about 25 photographs, but I have been shown about 200 photographs before.

Q When I talked to you on 10-19-72, the day it happened, I showed you several

photographs. Lieutentant King, I believe, was present when this happened. Is that true? And at that time, you did think that you had identified one person as being there, and the person you identified today you pull as a possible? Is that correct?

A Yes.

Q And your feelings are this is the person; however, you would like to view these persons in lineups?

A Yes.

Q To be positive? Is that right? Did I word that right, Lieutenant King?

[960] LIEUTENANT KING: Yes. I believe he indicated he could be more sure of his identification with more recent photographs. Is that what you told us?

A In other words, with recent photographs that, you know, are up to date, you know, because the appearance of these guys, you know, are not the same, you know, and

these photographs that you are showing to me now.

Q BY MR. HIGGINS: All right, continue. I stopped you where the one in the middle was stabbing and you looked at him?

A I looked at him, and he continued stabbing and right away I turned. I turned, like, a little, a little bit more to the front of the dorm again, and I seen the guy in the middle -- one of the guys that was at the bulletin board, he also attacked the inmate in the front, but he -- I couldn't see him because, you know, their backs were against me. You know, the guy that was getting stabbed, his back was covering my view.

I didn't continue looking no more. I looked in front of me to see what was happening, and the third guy was there coming at me with a knife, which at the time, you know, the only thing I could think of was to defend

myself. And I exchanged about three different swings with him, and I threw a kick at him, and he backed off, seeing that he wasn't going to get to me.

So and then we both stood right there in the dorm, looking directly at each other, and he seen that the job was finished. So he turned around and ran out the door, and then the other two guys just ran right in back of him, too.

Q I mentioned the long knife before. In our conversation earlier, you stated that you had observed knives. What did [961] you mean?"

A I saw two small ones, like, about as long as a hoe shovel, not very pointed, sort of round, and a big one, which I didn't get to see too well. But the two small ones, you know, one of them was in front of me, and the other one was in front of the inmate that got killed. And the other long knife,

the one that was being held by the taller person --

Q By "the taller", you are referring to this fellow in the picture?

A Yes, to --

Q Vargas, B-35042?

A To the taller person. He was holding the big knife, which I didn't get to see too much of the big knife, but I knew that's he's the one that had the main knife, you know, and that was doing all the killing.

Q Did you see any knife other than in the hands of anybody?

A No, I just saw them two small ones and the big one.

Q Of these three you saw, did you see them anywhere except in the hands of the three?

[962] A No, just I saw them in the hands of the three, and after everything was over, one fell to the floor, you know, -- one of the small ones fell to the floor.

Q It did? You saw one of them on the floor?

A Yes, sir. After all the stabbing was done, which I heard some, you know, sounds like jingling noise on the floor, you know, and after they all ran out, I turned around and I see one on the floor fall, you know, which made me want, you know, to grab it, but only ran away. I thought it would be best, you know, for me not to even touch it at all. And nobody touched it, you know.

Q What did you do then?

A What did I do then? Well, I, like, moved around back and forth, and I looked at -- I looked at the inmate, you know, that was laying on the floor. I seen Allen, you know. I seen he was going to fall down, you know. I seen Allen grab hold of him and lay him down, you know, and then I was jus standing there. And Allen was running back and forth, hollering that, you know, to get a doctor, because a man had been stabbed, you know.

And then I stooped down, you know, to see because I didn't think that, you know, that he was that badly hurt, you know, and then I touched the inmate in the back, to more or less see how badly hurt he was. And I seen that he was seriously hurt. I seen a hole in his neck and a slice in his back, and that's all.

And then I just stood up, and got away from him because everybody said to just clear away, you know, to move away from the area. So we moved away from that area, and at that time I [963] got kind of sort of panicked when I went back to my bed area. So the first thing I though, you know, to get out of this mess was to unstrip and take all the clothes off that had blood on me. My pants had blood on them, on the foot, and my shoes. At this time I was wearing nothing but state clothes. And I take my pants off and my shoes, and I put my shoes under my bed, and

my pant, I throw them down the aisle. And I dress, you know, completely different, you know, except my shirt. My shirt -- I'm still wearing the same shirt.

All right. From there, you know, they throw a shake down, and they still don't find out that I'm the other party that was there, you know. They took in Allen because he stood there. And I didn't, you know, -- moved away right away because I didn't want to have no part in this.

And then they finally found out and connected me to the pants, by finding, you know, a stain of blood when they took a skin shafe on the door of every inmate in it. They found a stain of blood on my arm, and they connected the pants they found in the aisle, and they knew that I was the other party from that dorm that was near him, nearest to him. And so this is how they -- how I'm here right now.

Q The shoes seized, and the trousers and the shirt seized later, were yours? Is that correct?

A Yes.

[965] Q All right. Now, when you were picked up on that day, the day of the incident, the 19th -- when you were searched, you said you were give a skin shafe. You are referring to an unclothed body search? Right? Were all your clothes taken off?

A Yes, uh-huh.

Q You were searched, and that was when the blood stain was found?

A Yes, sir.

Q And you volunteered the information at that time that that was your clothing that was picked up?

A No, sir. I was tooken -- I was tooken to your office, I believe, and there -- how do you call it? -- is where I told them that everything they found, you know,

connected to me, you know -- I didn't want to say nothing at the time in the dorm because there were too many, you know, people there, you know, and I didn't want to, you know, like, burden myself, throw myself a jacket there.

[966] Q BY MR. HIGGINS: And that was the first time you were questioned regarding this at all?

A Yes. He asked -- he asked if you wanted to talk to me -- which you were there at the time, too, and I told you, yes. I'll be glad to co-operate in any way you like me to and in a manner tell you anything you like to know, and you took me over to the board-room, and that's where we talked.

MR. HIGGINS: That's correct.

Q BY LIEUTENANT KING: And the board-room you referred to, that's the Adult Authority Hearing Room?

A Yes, sir.

Q Yes, that's a quiet room. And you didn't know any of these people that you saw on the day of the incident -- the people that you talked about being in the dorm? You didn't know them personally?

A I didn't know them personally at all, sir. How do you call it? I had seen the one -- one of them going towards the door several times there to a -- to make dealings of narcotics in there, you know, in the dorm with other inmates.

Q BY MR. HIGGINS: Have you recognized a picture of this person?

A Yes.

Q And who would that be?

A Who whould that be? Well, I don't know his name, but he more or less would be the tall guy that was doing the stabbing.

Q And is this the photograph --

A Yes, sir.

Q -- of the person there?

A Yes.

MR. HIGGINS: And again, this is Vargas, B-35402.

* * *

Q Now, after I talked to you and the Sheriff's deputies talked to you on the same day, the same afternoon of the incident, and we talked to you in the boardroom, you looked through some pictures, you were placed in segregation? Is that correct?

A Yes.

[968] Q What's your status now as far as your expected parole or release from prison?

A Well, I was going -- you know, in the way me and the counselor at the dorm, you know, had it, that we had discussed before, you know, this incident happened, that he was going to write my stuff up this week, this same week that we are talking on right now, maybe this Monday. And I was supposed to at least make the last Board in November or the

first Board in December, and I would be released.

[969] Q Okay. Now, you say that the counselor was going to write your stuff up. That's the paper work and the recommendations to the Narcotic Evaluation Board?

A Yes.

Q Recommending your release?

A Yes, sir.

Q That's what you are referring to about writing your stuff up?

A Yes, sir.

Q And you are saying before this incident that you had high hopes of being released in the near future?

A Yes.

Q BY MR. HIGGINS: One other question, Rigo. We have discussed this before. How were these persons dressed?

A They had jackets. They had beanie caps on.

Q Now, by jackets, was that state issued?

A State issued jackets. They were dressed out fully in state clothes, with black gloves, because that day it was sort of cold, and they all had black gloves.

Q They all three had black gloves?

A Yes, sir.

Q And beanies? Is that the Navy knit cap?

LIEUTENANT KING: It's like a Navy watch cap, a knitted full cap?

A Yes, uh-huh, blue-type.

LIEUTENANT KING: Referred to as watch caps.

Q BY MR. HIGGINS: Watch cap. Right? Did any of them have mustaches?

[970] A Yes.

Q Describe the best you can.

A Well, the one in front of me had a small mustache, more or less like mine, you know, pretty small.

Q BY LIEUTENANT KING: Like the mustache you are wearing now?

A Yes, uh-huh. It was thin, you know, and the one that was doing the stabbing, he had a thicker mustache, and he had sort of longer hair like coming up to his neck collar and twisting up, and he also was dark complected, and the other one that was standing in front of me was dark complected, too. The guy that was doing the stabbing -- he had sort of like -- he had a, like, he looked like an Indian, more or less, like an Indian dude.

Q Rigo, you say all three were wearing gloves?

A Yes. Well, all three, when they were at the bulletin board pointing at the papers, they all had gloves.

Q Now, how did you describe those gloves?

A Black gloves.

Q Black gloves?

A Yes.

Q Do you have any impression of what kind of material they might have been made of?

A Yes. Well, uh, I have a pair like that, the kind they have.

Q Were they cloth?

A No, they were like leather, like the kind they have, you know, that are made of black leather with, you know, felt [971] inside.

Q Some kind of a padding or fur inside it?

A Yes, sir, inside. Them kind of gloves -- street gloves.

Q Now, the states does not issue that type of glove?

A No, the state does not issue that type of glove.

Q And that would be personal property?

A Yes, sir.

Q Those have to be purchased from some outside source?

A Yes.

[1091] GARY CHARLES DARKE, Called as a witness for the defense, having been first duly sworn, took the stand and testified as follows:

[1093] A I was playing cards with Childress.

Q Do you recall if there was anyone else in the area?

A Yeah, there was a lot of people around the area. It's a dorm.

Q How long had you been playing cards with Paul Scott Childress?

A About twenty minutes, half an hour.

Q Do you recall Mr. Childress sleeping just prior to the time you were playing cards?

A No. I don't recall that he was sleeping. I just know he was playing cards.

Q And do you recall Officer Loomis coming up and waking him up at the time?

A No.

Q Did you ever leave the dorm during the morning hours?

A I don't know. More likely, I probably did.

Q Did you eat lunch that day?

A No.

Q And Mr. Darke, are you in the prison system at the present time?

A I'm on parole.

Q You are on parole at this time?

A Yes.

Q When you were there, sitting and playing cards with Mr. Childress, was there something that called your attention to the fact that something unusual was happening in the dorm? How did you know something was happeining in the dorm?

A I only heard of it when people

started running from [1094] the back of the dorm.

Q Could you tell us where those people came from that were running?

A From -- it's just like they started moving from the back of the dorm, and started coming up toward the front door, like you are coming on both sides.

Q Did you hear any scuffling or any noises along those lines?

A There was noises like -- but I couldn't flash on what it was. You know, there was noises all the time.

Q Do you recall what you did when people started running up?

A Yeah, I got up.

Q Did you move away from your bunk area?

A Yeah, I went up towards the head.

Q By the "head", you mean the toilet area?

A Yes, I got about as far as that little wall. That little wall wasn't there. They put that up since that incident.

Q Which wall are you referring to? The wall that runs down the center?

A No, the little wall -- it was there, but it was a lot higher. They come and knocked them all down.

Q Was there a wall there on October 19th?

A Yeah.

Q And was it changed later on?

A Yeah.

Q What changes were made?

A It was taken down two or three levels all along the [1095] block.

Q On October 19th, was this little wall the same height as the center wall, or was it a different height?

A The same height.

Q Can you tell us approximately how high that wall is?

A It's a little higher than I am sitting down, sitting straight. It's maybe about four or four and a half feet, maybe five.

Q When you are sitting on your bunk, can you see over that wall?

A I can see over it, but I can't see over the floor. I can see the other wall -- a little bit of the floor.

Q If you were sitting on your bunk area, could you see this area right here (indicating)? Could you see people in that area?

A No.

Q Were you sitting or standing, playing cards with Mr. Childress?

A Sitting.

Q And do you recall what Mr. Childress did when people started running up along the dorm ?

A He got up right after I did. We kind of walked up together.

Q Did he stand up before you or after you?

A After I did.

Q How long after you did he stand up?

A Like it was just a fraction of a second.

[1113] JAMES LEON FAULKNER, Called as a witness on behalf of the defense, having been first duly sworn, took the stand and testified as follows:

Q Now, did you conduct an interview with an inmate by the name of Jay Allen with regard to the killing of Mr. Arias?

A Yes, this was Florence Jasper Allen.

Q Can you tell us when that was?

A November 22, 1972.

Q Where was it?

A C.C.I at Tehachapi.

Q In the course of that interview, did Mr. Allen give you any description of how the attackers were dressed?

A Yes, he did.

Q And what did he say?

A He said they were wearing stocking caps, state issue at Tehachapi. They were pulled down over their ears, and they were wearing what he referred to as Levi issue coats, which were Levi jackets.

Q Did he indicate to you whether any of the attackers had mustaches?

[1118] A Yes, he did.

Q And how many of them did he indicate?

A He said one did.

Q Did he indicate to you whether or not all three attackers were Chicano?

A He stated they were Chicanos.

Q All of them?

A Yes. What he told me is they were Chicanos. I then said, "Could they have been Caucasian?" And he said, "They could have been. I'm not sure."

Q Did he indicate to you what he had been looking at during the course of this episode?

A Yes, a knife.

Q Did he indicate to you how long this entire episode took?

A Within a few seconds.

Q Did he indicate to you whether or not he had gotten a good enough look at any of the assailants to identify them?

A He stated that at that time, that from the time the indicent occurred until the time I interviewed him, that he had never gotten a look; he had never been able to observe any of the assailants to the extent where he could identify them.

Q Did he indicate to you why he had made an identification at the preliminary hearing?

A He indicated to me why he had informed the authorities that -- well, the

preliminary hearing hadn't taken place at that time.

Q Did he indicate to you why he hadn't made any specific [1119] identification?

A Yes, he did.

Q What did he say? What was the reason for that?

A There were a number of reasons.

Q Will you give them to us, please?

A Yes, the first reason was that at the time these defendants were taken out to photographed, they were the only ones taken out of segregation to be photographed. And apparently, there was some recent photographs taken. So he assumed that since they were the only ones in segregation that were on the chart, the photographic chart he was shown at a later time -- that they must be the ones that did it.

The second reason he gave was that he felt there was pressure from the Department

of Corrections, and when I say "pressure", what I mean there is that he was coming up to be paroled.

MR. MCGILLIVRAY: I will object. If I understand correctly, Mr. Faulkner is saying what Mr. Faulkner means.

THE COURT: Yes, I will sustain the objection and strike your impression.

Q BY MR. SIMRIN: Did Mr. Allen indicate to you what he meant by that?

A Yes, Mr. Allen indicated he was an "N" number, which means that he is there for narcotics and that he was due to be released, and that if he didn't co-operate with the people from the Department of Corrections, that he wouldn't be released at his date that he was due.

Q During the course of you interview with Mr. Allen, [1120] did the subject of lie detectors come up?

A Yes, it did.

Q Would you tell us in what regard that came up?

MR. MCGILLIVRAY: Your Honor, I will object without an offer of proof.

MR. SIMRIN: I will be glad to make one.

THE COURT: I don't see the materiality. I think you had better make an offer of proof if you intend to go through with it.

MR. SIMRIN: May we approach the bench, your Honor?

THE COURT: Yes.

(Off-the-record discussion between Court and Counsel.)

Q BY MR. SIMRIN: Mr. Faulkner, who mentioned the lie detector?

A Mr. Allen.

Q What did he say about it?

A He said that he was maintaining throughout the investigation by the Department of Corrections and by the Sheriff's

Office that he could not identify the men and then that he would be willing to take a lie detector to substantiate this.

[1153] JOE ESCOBAR, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

[1157] Q Were there any members there -- let me rephrase it.

To your knowledge, did any inmates at Tehachapi become members of the Familia at Tehachapi while you were there?

A Yes.

Q And who were they?

A Richard Montenero, Fred Allen, J. Allen, Freddy Baca.

[1264] THE COURT: All right. You can open the argument, [1265] Mr. McGillivray.

[1279] There are two other alibi witnesses on behalf of Mr. Mata -- Jerry Sanford and a William Joseph Bustillos. They also testified that they saw Mr. Mata playing chess.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff and Respondent.	)
vs.	)
SALVADOR VARGAS, DAVID GALLEGOS, and ROBERT MATA,	)
Defendants and Appellants.	)

[Filed November 4, 1974)

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNT OF KERN

Honorable P. R. Borton, Judge

RESPONDENT'S BRIEF

[Pg. 9] The photographs in question were available at trial and no objection as to the testimony concerning the pretrial identification was made. Appellants are thus too late to raise such contention on appeal. People v. Welch, 8 Cal.3d 106, 114-115 (1972); People v. Sirhan, 7 Cal.3d 710, 745 (1972).

As long as the photographs from which the witnesses made their identifications are preserved and available at trial, counsel for the accused, by using them in cross-examination of prosecution witnesses, can easily reveal the possibility of prejudice and thereby impugn the identification testimony. The court can, at the same time, examine such photographs and determine for itself if the display of photo was fairly presented. People v. Lawrence, supra, 4 Cal.3d 273, 278-279 (1971).

The procedure to be used in determining whether the photo-identification procedure is impermissibly suggestive is based on the totality of the circumstances of the case. Where, as in the instant case, there is no showing of influence by the investigating officers, the witnesses had an adequate opportunity to view the crime and their descriptions are accurate, the circumstances

indicate the inherent fairness of the procedure. People v. Greene, 34 Cal.App.3d 622, 646-647 (1973).

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT MATA, Petitioner,	)	
vs.	)	No. C-77-2801-SAW
GEORGE SUMNER, Repondent.	)	

[Filed December 9, 1977]

PETITION FOR WRIT OF HABEAS CORPUS

[Pg. 16]

II. PETITIONER IS ILLEGALLY IMPRISONED IN VIOLATION OF HIS RIGHT TO THE ASSISTANCE OF COUNSEL AS GUARANTEED BY ARTICLE I, SECTION 13, OF THE CONSTITUTION OF CALIFORNIA, AND BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

A. Appointed counsel failed to motion to suppress the tainted in-court identification testimony of prosecution witnesses Almengor and Allen.

The constitutional right to counsel contemplates "effective aid in the preparation and trial of the case." Powell v. Alabama (1932) 287 U.S. 45, 71 [77 L.Ed. 158, 53 S.Ct. 55].

> "It is counsel's duty to investigate carefully all defenses . . . that may be available to the defendant, and if his failure to do so results in withdrawing a crucial defense from the case, the defendant has not had the assistance to which he is entitled. . ." People v. Ibarra (1963) 60 C.2d 460, 464 [34 Cal.Rptr. 863, 386 P.2d 487].

The conviction must be reversed where it appears that counsel, through lack of

diligence, was unaware of a rule that is commonplace to an attorney engaged in criminal trials, when such rule is found in standard reference texts and was basic to the case. Ibarra, at 465.

> "Petitioner need not establish that he was entitled to reversal to show prejudice in the denial of counsel. . . A defense is crucial because it . . . might have produced a verdict for the defendant, not because it would have inevitably achieved a favorable result." In Re Smith (1970) 3 Cal.3d 192, 202 [90 Cal.Rptr. 1, 474 P.2d 969]. (Emphasis added.)

In Smith, supra, the California Supreme Court held that the defendant was deprived of the effective aid of appellate counsel in violation of the Sixth and Fourteenth Amendments by the failure [Pg. 17] to raise

certain assignments of error. One such assignment of error was the sufficiency of the in-court identification of the defendant, where the prosecution witness had been unable to positively identify him at a pre-trial police lineup. (Smith, at 200.) On the petition for habeas corpus relief, the Court thereby issued an order to show cause.

Similarly, a crucial defense to petitioner's case arose from the fact that the in-court identification testimony of prosecution witnesses Almengor and Allen was the direct result of constitutionally impermissible pre-trial identification procedures, and therefore inadmissible. Had counsel motioned to suppress their testimony, it would have been inadmissible unless the prosecution could establish by clear and convincing evidence that their in-court identification testimony had an origin independent of the pre-trial identification procedures.

(United States v. Wade (1967) 388 U.S. 218, 240 [18 L.Ed.2d 1149, 87 S.Ct. 1926]; Simmons v. United States, Stovall v. Denno, cited supra; see also People v. Caruso (1968) 68 C.2d 183 at 189-190.) In petitioner's case, it is unlikely that the prosecution could have met this burden of proof. Hence, the damaging and prejudicial testimony of Almengor and Allen would have been inadmissible.

The rule providing for the suppression of identification testimony resulting from impermissibly suggestive pre-trial identification procedures should be common knowledge to an attorney engaged in criminal trials. This defense was established six years prior to Petitioner's trial in the landmark United States Supreme [Pg. 18] Court decision of United States v. Wade, cited supra (see also Simmons, Stovall v. Denno and Caruso, cited supra), and has been discussed

numerous times in appellate opinions, law review articles, and the standard works of reference.

The prosecution's case was greatly dependent on the identification testimony of Almengor and Allen and counsel's failure to motion to suppress their testimony could not therefore have been based on tactics and strategy. Rather, counsel's failure to discover and present this defense resulted in the withdrawal of a crucial defense to Petitioner's case, thus denying him his right to effective counsel and due process of law.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT MATA, Petitioner, vs. GEORGE SUMNER, Repondent.	No. C-77-2801-SAW

[Filed February 28, 1978]

RETURN TO THE ORDER TO SHOW CAUSE AND POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

[Pg. 1] COMES NOW Respondent George Sumner, Warden, and for a return to the order to show

cause filed by this Court on January 19, 1978, states:

I

Respondent acknowledges that petitioner is presently confined in the California State Prison at San Quentin.

II

Petitioner is lawfully so confined pursuant to a valid judgment and commitment of the Superior Court of Kern County rendered in People v. Vargas, Gallegos, and Mata, No. 15771 (July 5, 1973), wherein petitioner was found guilty following a jury trial of violation of California Penal Code section 187 (murder in the first degree), and was sentenced to state prison [Pg. 2] for the term prescribed by law.[1/]

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1. In response to this Court's Order to Show Cause, respondent has lodged herein the state court record, as follows:

clerk's transcript; reporter's transcript of the trial; exhibits 23 and 24

(Footnote continued on next page.)

III

Petitioner was not denied due process by reason of an impermissibly suggestive pretrial identification procedure or by the inadequacy of appellate review of his conviction nor was he denied the right to effective assistance of counsel at his state court trial.

WHEREFORE, respondent respectfully submits that the Order to Show Cause herein be discharged, the petition denied and the proceedings dismissed.

/

/

/

Footnote 1 continued:

which were admitted at trial; the abstract of judgment; appellant's opening brief and respondent's reply brief on the appeal of the conviction, the opinion of the California Court of Appeal, petitioner's petition for writ of habeas corpus to the California Court of Appeal and respondent's opposition to that petition.

DATED: February 28, 1978

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Deputy Attorney General

Attorneys for Respondent

[Pg. 6] ARGUMENT

I

THE IDENTIFICATIONS OF PETITIONER BY INMATES ALLEN AND ALMENGOR WERE PROPERLY ADMITTED THOUGH THEIR ADMISSION WAS HARMLESS IN ANY EVENT.

Petitioner complains that the eyewitness identification of him by two of the three eyewitnesses to the murder, inmates Jay Allen and Rigoberto Almengor, [2/] was admitted

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2. Petitioner does not challenge the admission of Paul Childress' eyewitness identification. Childress testified that he was acquainted with petitioner and co-defendant Gallegos prior to the crime, (RT 268) that he witnessed the crime (RT 275-278) and he made in-court identifications of Mata, Gallegos and Vargas as the assailants (RT 279). Childress' testified that on October 20, 1972, the day after the incident, he reported to Lieutenant Mills what he had witnesses and verbally identified Mata and Gallegos by their know names, "Biggs" and "David" (RT 284-285). Childress testified that he then identified all three defendants' photographs from the Rolodex of pictures of hundreds of inmates (RT 285-286). Lieutenant Mills testified that he isolated the photographs of Mata and Gallegos and Childress confirmed their identify and then again picked their photos from the Rolodex (RT 676-677). Childress testified that he never had any doubt about his identification of the three defendants (RT 286-287).

in violation of his right to due process of law. This identical issue was raised on appeal from petitioner's conviction. The Court of Appeal, a court of competent jurisdiction, determined in a written opinion in a full ad fair hearing that the pretrial identification procedure was not impermissibly suggestive. Accordingly, this determination is presumed correct. 28 U.S.C § 2254(d). Petitioner is not entitled to relief herein unless, upon a review of the pertinent record as a whole, this Court finds that the state court determination that the identification evidence was properly admitted, was clearly erroneous. 28 U.S.C. § 2254(d). Petitioner bears the burden of establishing by convincing evidence, that the state court determination was clearly erroneous. 28 U.S.C. § 2254(d).

[Pg.7] Petitioner relies entirely on the facts contained in the state court records.

We submit that no demonstration has been made, let alone by convincing evidence, that the state court findings are erroneous or that the state fact finding process was deficient in any of the ways specified by 28 U.S.C. § 2254(d).

The facts surrounding the pretrial identifications procedures are as follows:

October 19, 1972

Both Almengor and Allen were questioned the evening of the incident. Almengor identified "Bogus" Pete Nunez to the authorities, a name which was told him by other inmates based upon his description of one of the assailants (RT 399). Almengor was then shown "Bogus" Pete's photograph along with several hundred other photographs of inmates (RT 422, 711, 914). Almengor identified "Bogus" Pete, and tentatively identified defendant Vargas, and inmates Ramirez and Reymundo (RT 734, 915). Almengor testified

that he selected eight photographs as bearing similarities to the assailants (RT 401).

Contrary to petitioner's assertion (Petition p. 7) the record reflects that Allen was not shown any photographs that evening since he asserted that he could not make any identifications (RT 720).

October 27, 1972

Due to prison disturbances, Almengor and Allen were not contacted for the purpose of making identifications until October 27, 1972 (RT 725, 927).

At this time, Allen was shown a group of photographs introduced into evidence as Exhibit 23, and which included the photographs of Mata, Gallegos and Vargas. The names of the inmates were, of course, concealed (RT 720). Allen again [Pg. 8] made no identifications, and complained that the photographs were too old (RT 720-721).

Almengor was also shown the photographs introduced at trial as Exhibit 23

with the names of the inmates concealed (RT 715). Outside Allen's presence, Almengor again tentatively identified the photo of Vargas (RT 437, 721, 959).

Almengor said that he felt that photographs were too old, that appearances might have changed, and he requested up-to-date photographs (RT 716).

October 30, 1972

On October 30, 1972, Allen and Almengor were shown a group of photographs introduced as Exhibit 24, and which included photographs of Mata, Gallegos and Vargas which had been taken between October 27 and 30 (RT 716).

First Almengor was shown the photographs with the inmates' names concealed, and he identified all three defendants (RT 722). Then Allen was brought in, and while Almengor stood on the other side of the room, Allen likewise identified Mata, Gallegos and Vargas as the assailants (RT 722).

Petitioner asserts that Almengor and Allen saw the three defendants being led out of segregation for the new photographs. However, Almengor testified that while he knew Gallegos was being photographed, he did not know Mata and Vargas were with him (RT 444-445). Allen testified at trial that he did not even know Gallegos was being taken out for the photographing (RT 634).

Next, petitioner claims that the only updated photographs included in Exhibit 24, were those of the three defendants. The correctional officers took new photographs of a number of other inmates but none of the photographs came out (RT 716, 754). Nevertheless, the photographs of the other [Pg. 9] inmates included in Exhibit 24 were reproduced to the same size hence they had the same appearance of newness, and were also black and white (RT 716; See Exhibit 24). Accordingly, there was no suggestiveness by

virtue of the fact that defendants' pictures were the only ones presented in updated versions.

Petitioner complains that the photographs tentatively identified by Almengor on October 19, were not included in Exhibit 24. Firstly, this fact has absolutely no bearing on Allen's identification of defendants since he never made a prior identification and was not shown photos on October 19. With respect to Almengor's identification, failure to include those photos does not suggest anything with respect to defendants; if anything, it suggests only that the correctional officers did not consider those inmates (Reymundo, Ramirez and Nunez) as suspects.

Finally, petitioner contends that Exhibit 24 "suggested" that defendants were suspected of committing the crime because their photographs, which were shown on October 27 in Exhibit 23, recurred in

Exhibit 24 and by virtue of that fact, were emphasized.

A comparison of Exhibit 23 and Exhibit 24 does not support petitioner's case of suggestiveness. Almost all of the photographs in both exhibits are of inmates of Mexican descent, with similar facial features, hair style, and clothing. Many of the photographs in Exhibit 24 could be mistaken for updated photographs of inmates included in Exhibit 23. Indeed, petitioner's photograph in Exhibit 24 is very different from his photograph in Exhibit 23. Accordingly, it is not at all obvious that petitioner's photograph was repeated, and we submit a comparison of the exhibits does [Pg. 10] not suggest that petitioner committed the crime, or emphasize him in any way.

Thus, we conclude that the photographic identification was not at all suggestive. However, even if a pre-trial identification procedure is unnecessarily suggestive,

due process does not require its exclusion per se. Rather, reliability is the linchpin in determining the admissibility of identification testimony. Manson v. Brathwaite (1977) ___ U.S. ___; 97 Sup. Ct. 2243, 2253. The factors which must be considered in determining reliability were set out in Neil v. Biggers (1972) 409 U.S. 188, 199-209 and include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. See Manson v. Brathwaite, supra at 2253.

The stabbing took place in a prison dorm in the afternoon (RT 367-377; 586). Both Almengor and Allen were watching the fight and were looking at the defendants (RT 377; 586-587). Both Almengor and Allen were

also attacked by two of the defendants as they tried to held the victim (RT 588-589); petitioner Mata was one of the two attacking defendants and he and Almengor engaged in a fight where a good deal of eye contact was made (RT 379-383). Allen knew petitioner Mata before this incident when he lived in the same dorm as Mata (RT 595). Finally, once an up-to-date photograph of petitioner Mata was shown to Allen and Almengor their identifications which were made within 11 days of the killing were positive and unequivocal (RT 402-404; 596-598).

[Pg. 14] II

PETITIONER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY VIRTUE OF THE FAILURE TO OBJECT TO HIS IDENTIFICATION BY INMATES ALLEN AND ALMENGOR AS ONE OF THE ASSAILANTS, THOUGH THIS COURT HAS DISCRETION TO DENY RELIEF DUE TO PETITIONER'S FAILURE TO RAISE THIS ISSUE ON APPEAL FROM HIS CONVICTION IN STATE COURT.

At trial, there was no objection to the introduction of the eyewitness identifications of defendants by inmates Almengor,

Allen and Childress. Petitioner Mata asserted on appeal from this conviction that the pre-trial procedures were impermissibly suggestive. There was no claim of ineffective counsel by the failure to object to the admission of this evidence. Nor did the appellate court address this issue; it only ruled that the photographic line up procedure was not suggestive and hence the admission of the identification evidence was proper.

In his petition for writ of habeas corpus in the state appellate court, petitioner raised the issue of effective assistance of counsel for the first time. That petition, which raised the same three issues raised herein, was denied summarily without opinion.

Inasmuch as petitioner did not raise this issue when he could have done so on appeal from his conviction, and since the state court has never ruled on the merits by

virtue of the summary denial of the habeas petition, we submit that the Court has the discretion to deny relief on the basis of the deliberate by-pass of this issue. 28 U.S.C. § 2243; Fay v. Noia (1963) 372 U.S. 391, 438-440; Curry v. Wilson (9th Cir. 1968) 405 F.2d 110, 111-112.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT MATA, Petitioner, vs. GEORGE SUMNER, Repondent.	)	No. C-77-2801-SAW

DECLARATION OF JAMIE JACOBS-MAY

I Jamie Jacobs-May, Deputy Attorney General hereby declare as follows:

Pursuant to the discussion between Court and counsel on April 5, 1976, we are filing this supplement to our return.

In compliance with Rule 5, 28 U.S.C 2254, we state that petitioner has exhausted state remedies.

We invite this Court's attention to the recent decision in Wainwright v. Sykes (1977) 433 U.S. 72, which establishes a

procedural default test to replace the former deliberate bypass test. Sykes holds that when a state prisoner fails to raise a federal claim in a timely fashion, as required by a state's contemporaneous objection rule, the state no longer need show that the omission was a tactical choice, or "deliberate bypass." Instead, federal review is barred "absent a showing of good cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violations." Id. at 84. Thus, petitioner must show actual prejudice with respect to his claim of incompetency of counsel (incompetency of counsel constitutes a showing of good cause), and both good cause and prejudice resulting from his failure to challenge the adequacy of the record before the Court of Appeal at the time that review was made.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 7, 1978, at San Francisco, California.

JAMIE JACOBS-MAY
Deputy Attorney General

ORIGINAL

Supreme Court, U. S.
FILED
MAY 15 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-1601

GEORGE SUMNER, WARDEN,
Petitioner,
v.
ROBERT MATA,
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Robert Mata, by and through his counsel, asks leave to file the attached Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The affidavit of Respondent in support of this motion is attached hereto.

May 13, 1980

Ezra Hendon

EZRA HENDON
Deputy State Public Defender

Counsel for Respondent

EH:smc

1/

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1601

GEORGE SUMNER, Petitioner

v.

ROBERT MATA

AFFIDAVIT

I, ROBERT MATA, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1. I am the petitioner in the above-entitled case. 2. Because of my poverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that I am entitled to the redress I seek in said case. 5. The nature of said cause is briefly stated as follows:

On July 4, 1973, I was sentenced to life imprisonment for first degree murder in the Superior Court of California, County of Kern. A petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging that conviction was subsequently filed in the United States District Court for the Northern District of California. That petition was granted on appeal by the United States Court of Appeals for the Ninth Circuit on the ground that the conviction was based on the use of unconstitutional identification procedures.

Robert Mata
ROBERT MATA

Duly witnessed and sworn to
before me, a Notary Public,
this 13th day of May, 1980.

Eleanor S. Gerould
Notary Public

ELEANOR S. GEROULD
NOTARY PUBLIC - CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission Expires Oct. 19, 1980

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1601

GEORGE SUMNER, WARDEN,

Petitioner,

v.

ROBERT MATA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES CITED

Manson v. Brathwaite 432 U.S. 98 (1977)	6,8,9,11
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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GEORGE SUMNER, WARDEN,

Petitioner,

v.

ROBERT MATA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Robert Mata respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 611 F.2d 754.

JURISDICTION

Respondent accepts petitioner's statement of jurisdiction in this case.

QUESTIONS PRESENTED

1. In a case in which a state prisoner seeking federal habeas corpus relief has twice presented the ground on which he seeks relief to all available state courts and those state courts have twice decided the issue raised, can it be said that the petitioner has failed to exhaust available state remedies, as is required by 28 U.S.C. § 2254 (b) and (c)?

2. When in deciding that the admission of identification testimony obtained through the use of flagrantly suggestive identification procedures has deprived a criminal defendant of due process of law, a federal court of appeal has cited and applied the legal standard approved by this Court for the disposition of such questions, should this Court grant certiorari to review the lower court's factual determination that a substantial likelihood of irrevocable misidentification existed in this particular case?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioner's statement of the provisions relevant to this case.

STATEMENT OF THE CASE

Respondent accepts petitioner's description of the procedural history of the case. Respondent offers the following statement of facts relevant to the due process issue raised in this case:

This case involved a homicide at the medium security prison, C.C.I., Tehachapi, California, on October 19, 1972. The prosecution's case was based chiefly on the theory that the homicide was a result of feuding between opposing prison factions. It was alleged that within the California Prison System there existed two such factions -- the "Mexican Mafia" and the "Nuestra Family". The homicide victim, Leonard Arias, was alleged to have been a member of the "Nuestra Family". It was alleged that prior to being transferred to Tehachapi, Mr. Arias had attacked a member of the "Mexican Mafia" while incarcerated at San Quentin. It was further alleged that as a result of this attack the "Mexican Mafia" had put a "contract" out on the life of Mr. Arias. On October 19, 1972, the day after his arrival at Tehachapi, Mr. Arias was stabbed and killed.

The prosecution alleged that Respondent Robert Mata and co-defendants David Gallegos and Salvador Vargas (hereinafter referred to as "Respondent", "Gallegos" and "Vargas", or collectively as "defendants") were members of the "Mexican Mafia" and charged them with the homicide. At trial, the prosecution's case rested on the testimony of three inmates, Rigoberto Almengor, Florence J. Allen and Paul Childress, alleged eyewitnesses to the homicide.

On October 19, 1972, soon after the homicide, Almengor was shown several hundred photographs of inmates by prison officials (RT 422).[1/] He selected four photos, making a positive identification of Pete Nunez as the person who did the stabbing (RT 420, 733) and tentatively identifying inmates Ramirez, Reymundo, and Vargas as the other assailants (RT 734). He did not identify Respondent Mata as a participant (RT 712). He then changed his "positive" identification of Nunez when prison authorities told him that Nunez had been outside the prison on the day of the killing (RT 433, 713).

One week later, on October 27, Almengor and Allen were shown 24 photos of inmates, including photos of the three defendants (RT 714, 720, Exhibit 23). Six of the photos dated as far back as 1964 to 1970, while those of the defendants had been taken in February, March and July of 1972 (RT 917, 918). Allen was unable to make any identification, stating that he didn't get a good enough look at the assailants (RT 720, 721). Almengor did not identify Respondent Mata. He stated that the group of photos was old and asked to see some recent ones (RT 715).

After Almengor's request, a series of updated photos was taken, and although none of the photos turned out, only those of the three defendants were taken a second

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1. RT refers to the Reporter's Transcript at Respondent's state court trial.

time (RT 759). Moreover, when taking the defendants to be photographed, they were led out of the segregation unit in partial view of Almengor and Allen.[2/]

On October 30, 1972, Almengor and Allen were shown fifteen photos of inmates, nine fewer than on October 27 (RT 718). The only updated photos included were those of the three defendants (RT 754). Not included in the group of fifteen photos were the ones of Ramirez, Reymundo and Nunez (RT 925), a significant fact because Almengor had identified them as the perpetrators of the homicide when shown photos on October 19. As Petitioner effectively conceded in the District Court, the reason for this exclusion was that the state considered Almengor's original identification "wrong" since it did not concur with the state's choice of suspects (Respondent's Return p. 9). The photos were thus removed to facilitate "court" identification by Almengor and Allen in future lineups.

Almengor previously had described the assailants as wearing mustaches (RT 970) and Almengor and Allen knew that new pictures of the suspects had been taken (RT 444, 446, 1119). When prison officials showed Almengor and Allen the photo lineup on October 30 it contained only three new photos, those of Respondent Mata, and Gallegos and Vargas (RT 754). Each of these three suspects was posed identically, wearing prison clothes and with a placard hanging around his neck. Each wore a mustache, though none of the other inmates dressed in prison clothing did (Exhibit 24). From these fifteen photos, Almengor selected those of the three defendants (RT 718). Prior to this time, he had never identified

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2. Almengor testified that he saw "three persons" being led out and knew they were going to have updated photos taken (RT 444, 446). Allen could see them well enough to later recognize them from photos (RT 119).

Respondent Mata (RT 475). Allen also selected the photos of the three defendants, including Respondent Mata (RT 722).

Shortly after the killing, prison officials had discovered bloody clothing belonging to Almengor, which he had hidden (RT 385, 386, 764). He was informed that he was a suspect (RT 465, 764), and consequently was under pressure to make identifications and prove that he was not involved (RT 466). Secondly, throughout the entire investigation, Almengor insisted that he could not make a positive identification from photographs. He maintained that he could not make a positive identification unless he saw the persons in a lineup (RT 437, 438, 712, 740). Despite his repeated requests for a lineup (RT 457, 496, 781, 783, 932, 959), none was ever provided as it would have required the constitutional safeguard of an attorney's presence (RT 701).

Prior to October 30, inmate Allen expressed similar doubts about his ability to identify the assailants. On several occasions, including October 19 and 27, Allen told investigating officers that he didn't see the assailants well enough to identify them from either photographs or a lineup. (RT 630, 720, 721, 924.) Allen testified that the California Department of Corrections had reminded him of his upcoming parole date and had threatened to transfer him to another institution where his life would be in danger if he did not testify. (Preliminary transcript 188-89.) He stated that his main thought throughout the identification procedure was keeping himself alive. (Preliminary transcript 197.)

On November 22, 1972, Allen told Mr. Faulkner, private investigator for the defendants, that:

(1) the incident lasted only a few seconds and he didn't get a good enough look at the assailants to identify them (RT 1118);

(2) throughout the investigation by the Sheriff's Department and the Department of Corrections he maintained that he could not identify the assailants and would take a lie detector test to substantiate it (RT 1118);

(3) he identified the defendants because he saw them being taken out of segregation to have photos taken; that they were the only persons from segregation whose photos were on the chart; and that he assumed they must be the ones that did it (RT 1119);

(4) he was under pressure from the Department of Corrections to make an identification as he was coming up for parole (RT 1119).

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner claims that the present case presents two issues worthy of this Court's attention, one concerning the exhaustion procedures required under 28 U.S.C. § 2254, one concerning the legal standards to be applied to claims of constitutional inadmissibility of eyewitness identification testimony. The procedural claim is patently without merit. As to the constitutional issue, an examination of the Ninth Circuit's opinion reveals that the Court of Appeals applied the legal standard that this Court recently has approved for the measuring of such claims: that eyewitness testimony is to be admitted unless obtained by procedures so suggestive as to raise a very substantial likelihood of irreparable misidentification. 611 F.2d at 758, citing Manson v. Braithwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972). The only question actually raised by the present case is an extremely narrow one -- i.e., in its application of an appropriate legal standard to a particular set of facts, did the Court of Appeals reach a correct result? Respondent

asserts that the Court did, and furthermore that this fact-intensive question is not of sufficient significance to merit review by this Court.

A. Respondent Plainly Exhausted His State Judicial Remedies as Required by 28 U.S.C. 2254.

Respondent's claim that his conviction was based upon the unconstitutional use of impermissibly suggestive identification procedures was twice presented and twice decided on its merits by the California state courts: once on direct appeal to the California District Court of Appeal;[3] and for a second time on a state writ of habeas corpus denied on its merits by the state Superior Court, Court of Appeal, and Supreme Court.[4] Thus, unlike Wainwright v. Sykes, 433 U.S. 72 (1977), in which the constitutional issue raised by petitioner on federal habeas corpus had never been passed on by the state courts, respondent did exhaust all available state court remedies, as required by 28 U.S.C. § 2254(b) and (c), and the federal appellate court so ruled. 611 F.2d at 755.

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3. See the opinion in People v. Vargas, et al., 5 Crim. 1735, issued August 4, 1975 by the California Court of Appeal, First Appellate District, attached to petitioner's certiorari application as Appendix C.

4. As the United States District Court stated in its opinion in this case: "'While that petition was denied without opinion, for purposes of habeas corpus review it is assumed that the state court addressed the merits of the petition.' Thompson v. Procunier, 539 F.2d 26, 28 (9th Cir. 1976)." See Petitioner's certiorari application, Appendix D2.

B. The Ninth Circuit Employed an Appropriate Legal Standard in its Decision Below, And its Determination on the Unique Facts of This Case that Respondent's Due Process Rights Had Been Violated is Both Correct and of Insufficient Importance to Merit This Court's Review.

Petitioner asks this Court to grant a writ of certiorari to determine whether the Ninth Circuit was correct in excluding identification testimony on the ground that the procedures by which it was obtained were unnecessary as well as unreliable. Had the Court of Appeals truly rested its holding that the evidence should have been excluded from Respondent's state court trial on its finding of a lack of necessity for the identification procedures employed, petitioner's certiorari application might present some merit. For while this Court has consistently discussed the issue of the necessity for the use of a given identification procedure in determining the constitutionality of that procedure,[5/] it recently ruled that identification evidence may be admissible, even if obtained through unnecessarily suggestive procedures, if "the out-of-court identification possesses certain features of reliability." Manson v. Brathwaite, 432 U.S. 98, 110 (1977). Even a cursory examination of the Ninth Circuit's opinion, however, reveals that the Court of Appeals applied this precise teaching of Manson v. Brathwaite; petitioner's argument concerning the issue of "necessity" is thus a shoddily-constructed straw man.

In beginning its analysis, the Ninth Circuit stated that an identification procedure is violative of due process when it is unnecessarily suggestive and conducive to irreparable mistaken identification. Mata v. Sumner, supra, 611 F.2d at 757. The Court went on to emphasize that ". . . lack

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5. See Manson v. Brathwaite, 432 U.S. 98, 110 (1977); Neil v. Biggers, 409 U.S. 188 (1972); Simmons v. United States, 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967).

of necessity is not a per se ground for rejection of the identification," citing United States v. Valdivia, 492 F.2d 199, 210 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974). While "necessity is an important factor to be considered in judging the validity of the identification procedures," the Court of Appeals reiterated the adjuration of Manson v. Brathwaite that: "Unnecessary suggestability alone does not require exclusion of the subsequent identification." 611 F.2d at 758.

> "'It is the likelihood of misidentification which violates a defendant's right to due process . . . .' Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 381-382, 34 L.Ed.2d 401 (1972). In other terms, 'the focus is on the reliability of the witnesses' identification rather than on the flaws in the pretrial identification procedures.' United States v. Barron, 575 F.2d 752, 754 (9th Cir. 1978)." 611 F.2d at 758. (Emphasis added.)

The Court of Appeals analyzed critical issues such as the witnesses' opportunity to view the assailants, the degree of attention afforded them, the accuracy of their descriptions, and the witnesses' level of certainty.[6/] Id. All of these factors are to be considered under Manson and Neil. Furthermore, eleven days intervened between the Arias killing and the identification made by Allen and Almengor through the use of impermissibly suggestive procedures. Thus there is herein present the troubling factor of a significant passage of time between the crime and the confrontation that did not occur in Manson v. Brathwaite. 432 U.S. at 115-16.

It was upon these factors that the Court rested its finding that "the photographic identification procedure was so

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6. See, e.g., the Court's comments concerning witnesses Almengor and Allen: "Here, Almengor was not merely 'equivocal' on the first selection. He selected photos of three individuals whom the prosecution asserts were not involved at all. Allen said he would not look at the photos because he said he could not make an identification." 611 F.2d at 758.

impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 611 F.2d at 759. It seems obvious that the Court of Appeals reversed Respondent's conviction not because it believed that state officials used procedures less desirable than others readily available, but because it found that the procedures used produced identification testimony so unreliable as to raise the specter that an innocent man had been misidentified.

Petitioner's objection appears to rest on the fact that the Ninth Circuit's opinion contains any discussion of "necessity" whatsoever. The Court did make a finding "that there was no necessity here to use photographic identification procedures" as opposed to an in-person lineup. While lack of necessity for a given set of identification procedures cannot invalidate testimony acquired by their use, necessity for the employment of such procedures can serve as their constitutional justification. See Simmons, supra, 390 U.S. at 385; Stovall v. Denno, 388 U.S. 293, 201-02 (1967). Hence necessity for the use of certain procedures or its absence is always an appropriate threshold issue to be discussed and disposed of, for so doing may obviate the need to determine whether those procedures gave rise to a substantial likelihood of misidentification.

Furthermore, a unique fact of the present case gave the use of a photographic spread rather than an in-person lineup added significance. Witness Almengor had insisted to prison officials that he could not make an accurate identification from photographs, but only from an in-person lineup (RT 437, 438, 712, 740). In view of that statement, the use of photographs rather than an in-person lineup was a factor going to the reliability of any subsequent identification made from photographs by Almengor, and hence was an

appropriate element to be considered in determining the likelihood of an "irreparable misidentification" by him. Thus the fact that the Ninth Circuit discussed the lack of necessity for the use of a photo spread indicates no deviation from the lesson of Simmons, Neil v. Biggers, and Manson v. Brathwaite that only the substantial threat of misidentification can bar the admission of identification testimony.

It is worthy of note that Petitioner concedes that the same analysis applied in this case has been used by the Ninth Circuit in numerous recent cases. United States v. Crawford, 576 F.2d 794, 797 (9th Cir. 1978), cert. denied 439 U.S. 851 (1978); United States v. Pheaster, 544 F.2d 353, 370 (9th Cir. 1976), cert. denied 429 U.S. 1099 (1977); United States v. Calhoun, 542 F.2d 1094, 1104 (9th Cir. 1976), cert. denied 429 U.S. 1064; United States v. Valdivia, supra. In all four of these cases, identification testimony was deemed admissible over objection that it was obtained through unnecessarily suggestive procedures. In Crawford, Calhoun, and Valdivia, the Ninth Circuit so ruled despite finding the procedures used to have been unnecessary. Thus the Ninth Circuit standard employed in the present case, as in these other four, has not led to any undue emphasis on the issue of necessity, or deviation from the core question of reliability. Perhaps it is for that reason that this Court declined to review the Ninth Circuit's rulings in Crawford, Calhoun, Pheaster, and Valdivia.

Given this consistent refusal of the Ninth Circuit to bar the admission of eyewitness identification because the procedures used to obtain it were unnecessary, there is no meaningful conflict between its holdings and that of United States v. Gidley, 527 F.2d 1345 (5th Cir.), cert. denied 429

U.S. 841 (1976), which held that the availability of less suggestive methods of identification is "not relevant" in determining whether a photographic display is impermissibly suggestive. Id., at 1350. The fact is that in no case -- including the present one -- has the Ninth Circuit applied the concept of unavailability in other than a threshold way or as a factor tending to prove suggestibility. See, e.g., United States v. Crawford, supra, 576 F.2d at 797-98. The Ninth Circuit's use of necessity as a consideration in identification cases is therefore wholly without doctrinal or practical significance. Not a single case in the Ninth Circuit has ever turned on whether identification procedures were unnecessary and surely the present case did not. The discussion of necessity below consumed only a very small part of the Court's discussion and any fair reading of the entire opinion makes plain that lack of necessity did not form the sole or main basis for the Court's decision.

Under these circumstances any differences between the Ninth and Fifth Circuits on this question are demonstrably without practical consequence. To the extent that any conflict in the circuits exists at all, therefore, it is essentially semantic and not one which requires the time or attention of this Court. For the Ninth Circuit has shown itself quite willing to affirm convictions even when particular identification procedures are unnecessary.

The Ninth Circuit plainly applied the correct legal standards in this case; Petitioner's true complaint is that, in Petitioner's opinion, the Court of Appeals' application of the right legal standard produced the wrong result. Such a claim is equally apposite in every case where a state or federal appellate court must decide a constitutional issue

presenting a mixed question of fact and law.[8] Were the United States Supreme Court to attempt to review such rulings as a matter of course, its workings rapidly would grind to a halt. It is for that reason that the Court limits its case-load to those matters raising important questions of law, of which this case presents none. Petitioner's petition for a writ of certiorari should be denied.

/

/

/

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

DATED: May 13, 1980

Respectfully submitted,

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UNITED STATES SUPREME COURT

OCTOBER TERM 1979

No. 79-1601

GEORGE SUMNER, WARDEN,	)
	)
Petitioner,	)
	)
v.	)
	)
ROBERT MATA,	)
	)
Respondent.	)
	)

CERTIFICATE OF SERVICE BY MAIL

EZRA HENDON, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 1390 Market Street, Suite 425 in the City and County of San Francisco, State of California; that on May 13, 1980, he served a true copy of the attached Respondent's Brief in Opposition to Petition for Writ of Certiorari on each of the following, by placing same in envelopes addressed respectively as follows:

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Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

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Supreme Court, U.S.
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No. 79-1601

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

GEORGE SUMNER, WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,
Petitioner,

vs.

ROBERT MATA,
Respondent.

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Is defendant's claim barred from federal habeas corpus review, and if not, are the state appellate court's factual findings entitled to the statutory presumption of correctness?

A. When a state prisoner failed to object to in-court identification testimony as required by state law, does consideration of the issue on the merits by a state appellate court foreclose the state from asserting the doctrine of procedural default in a federal habeas proceeding?

B. Assuming that the state appellate court's action precludes the state from asserting the doctrine of procedural default in the federal habeas proceeding, does the presumption of correctness of Title 28, United States Code, section 2254(d) apply to the state appellate court's factual findings?

2. Did the Court of Appeals apply erroneous standards in evaluating defendant's claim of denial of due process in the use of pretrial identification procedures?

A. Does the availability of a suspect for a physical lineup render the use of photographic identification procedures constitutionally suspect?

B. Did the Court of Appeals use the correct standard to determine whether there was a substantial likelihood of irreparable mistaken identification?

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No. 79-1601

In the Supreme Court

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United States

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GEORGE SUMNER, WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,
Petitioner,

vs.

ROBERT MATA,
Respondent.

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Mata v. Sumner*, 611 F.2d 754 (9th Cir. 1979). Petition for rehearing was denied December 31, 1980, and is unreported.

JURISDICTION

The jurisdiction of this Court arises under Title 28, United States Code, section 1254(1). The petition for a writ of certiorari was granted on July 2, 1980.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, section 2254(d) provides in pertinent part:

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a

> person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct,
>
> • • •
>
> "And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

United States Constitution, Amendment XIV, section 1 provides in part:

> ". . . No State shall deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Proceedings in State Court

A jury convicted Robert Mata of first degree murder. He did not litigate the admissibility of identification testimony at trial.

The California Court of Appeal considered on the merits an argument relating to the admissibility of the identification testimony, notwithstanding the failure to object to the introduction of this evidence in the trial court. The court concluded that the circumstances of the case "indicate the inherent fairness of the procedure, and we find no error in the admission of the identification evidence." (Petition for Certiorari, C-5.) Specifically, the Court of Appeal found that the photographs displayed to the witnesses were available for cross-examination purposes at the trial, that there was no showing of influence by the investigating officers, that the witnesses had an adequate opportunity to view the crime, and that the descriptions by the witnesses were accurate. (Petition for Certiorari, C-4, 5.)

Defendant did not seek hearing before the California Supreme Court.

In habeas corpus proceedings, defendant again raised this issue, and for the first time complained that his counsel was incompetent for failing to object to the identification evidence at trial. The California Superior Court, Court of Appeal, and Supreme Court denied these habeas corpus petitions without opinion.

B. Proceedings in Federal Court

1. The District Court

The district court failed to discuss or make any findings with respect to our section 2254(d) argument. The court also rejected our argument that defendant's claims were beyond federal review because of his procedural default. The district court proceeded to the merits of the eyewitness

identification claim and, based upon the same state court record, denied the petition after stating somewhat cryptically that "petitioner has established that irregularities occurred in the pretrial photographic identification of petitioner by witnesses Almengor and Allen." (Petition for Certiorari, D-3.) The court concluded that these irregularities did not taint the in-court identifications by the witnesses and further concluded that even if the testimony of Allen was tainted, the positive identification by Childress and the strong identification by Almengor made the error harmless beyond a reasonable doubt. The court also found that trial counsel was not incompetent for failing to litigate the identification issue because the claim was "at best arguable, and that any error was harmless beyond a reasonable doubt." (Petition for Certiorari, D-3.)

2. The Court of Appeals

The Ninth Circuit's opinion not only failed to acknowledge our section 2254(d) argument, but also did not review the district court's findings. Instead, after reviewing the trial court record, the court found itself "driven to the conclusion that the photographic identification procedures was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (Petition for Certiorari, A-11.)

C. Evidence Presented At Trial

1. The Murder

Rumor that the victim, Leonard Arias, was being transferred to the California Correctional Institution at Tehachapi preceded his arrival. (RT 638-639, 1162.) Arias,

a member of the "Nuestra Familia" stabbed a member of the rival "Mexican Mafia" while incarcerated at San Quentin; in retaliation, the "Mexican Mafia" put out a "contract" on his life. (RT 823, 955.)

Carlos Ortega, Chief of the "Mexican Mafia" at Tehachapi, testified that defendant Mata, and his two codefendants Gallegos and Vargas were "Mafia" members. (RT 811-812, 834-844.)

Mata informed Ortega that Arias had arrived and that they were ordered "to hit" him. (RT 822-824.) Ortega told Mata that he did not want any trouble. (RT 824.) The following day, October 19, 1972, Ortega met Mata and Gallegos, who wanted to "get down," meaning arm themselves with knives and stab Arias. (RT 827-828.) Vargas joined them and said "We've waited long enough." (RT 828-829.) Mata and Gallegos left and returned about 10 minutes later. Mata, wearing black gloves, tried to give Ortega a knife but Ortega refused. (RT 829-830.) Mata said he had another knife inside his belt. (RT 831.) When Ortega said he did not want trouble Vargas called him a "crybaby."

Joe Escobar, an officer of the Nuestra Familia, observed the three defendants talking with Ortega before proceeding toward dorm 8. (RT 1175-1176.) All three were wearing watch caps, and Mata and Gallegos were wearing gloves and blue levi jackets. (RT 1176.)

In dorm 8, the victim was socializing with his hometown friend, Jay Allen, and a new acquaintance, Rigoberto Almengor. (RT 583-584, 600.) Paul Childress, another inmate who lived in dorm 8, knew Mata from a prior drug dealing and noticed him standing by the bulletin board in the dorm.

(RT 268, 273.) He also observed Gallegos walking in the dorm. (RT 271-272.)

At about 1:30 p.m., a call came over the institution's loudspeaker ordering all new arrivals to report to the prison laundry room. (RT 408.) The victim, accompanied by Allen and Almengor started out. (RT 372-373, 583.) There was daylight in the dorm and visibility was excellent. (RT 801, 947.)

Almengor saw two inmates standing by the bulletin board and a third leaning against a nearby wall. They did not live in dorm 8, and he did not know them, but had seen Vargas before dealing drugs. (RT 374, 745, 957-958, 966.) Allen also saw the three men. (RT 795.) Allen knew Mata since they once resided in the same dorm. (RT 595.) In tape recordings made during the eleven days following the killing, both Allen and Almengor described all three as wearing black leather gloves, state issued jackets and pants and navy blue knit beany caps. (RT 621-622, 746, 969.) Allen thought all three men had mustaches. (RT 621.) Almengor described one assailant as dark complected, with a small, thin mustache, and Vargas as "an Indian dude" with a thicker mustache who was taller than the other two. (RT 479, 961, 970.)

As Almengor, Allen and Arias got closer, the three defendants pulled their hands out of their coats and attacked Arias with knives. (RT 958.) Two of the knives were small, one was long. (RT 961.) Vargas, armed with the long knife, pulled down Arias' shoulder and stabbed him. (RT 749, 795-96, 959.) Vargas jabbed at Allen, and ripped his jacket. (RT 796.)

Meanwhile, in the midst of this attack, Almengor turned forward, he and Mata made eye contact, and Mata came at him with a knife in his right hand. (RT 379, 747, 960.) Mata swung twice, and Almengor tried to kick the knife out of his hands. (RT 380.) They fought with their fists, swinging several times at each other. (RT 380, 747, 960.)

As Mata backed off, they stood there "looking directly at each other." (RT 960.) Turning his attention back to the stabbing, Almengor heard and saw a knife fall to the floor, and saw Arias falling. (RT 381-382, 747-748.) Almengor again looked Mata in the face, motioning that he wanted nothing to do with this. (RT 382.) Mata seemed to understand, he turned around and ran out the door, followed by his codefendants. (RT 383, 748, 960.)

Childress testified that as he came out of the bathroom area he heard scuffling and observed Arias, Mata, Gallegos and Vargas fighting. (RT 275, 279.) He did not see Allen or Almengor. (RT 303.) Childress thought it was just a fight until he saw a small silver knife fall to the floor. (RT 276.) He then returned to his bunk area. (RT 281.)

Allen's screams finally drew the attention of Officer Loomis. Allen yelled, "a guy has been stuck, get an ambulance." (RT 236.) Loomis opened his office door and dialed control for assistance. (RT 237.)

One and one-half minutes after hearing the fight in dorm 8, inmate Juan Olvera saw Gallegos coming from nearby dorm 6. (RT 512.) Gallegos was in a hurry and told Olvera, "If they ask about me, tell them I've been with you for the last hour." (RT 513.) Gallegos was nervously clenching a pair of black leather gloves. (RT 514.) A short time later,

Joe Escobar saw Gallegos in the library. Gallegos seemed very different—pale and excited. Olvera saw Gallegos and another inmate exchanging a magazine containing a piece of shiny metal. (RT 1179.) From Gallegos' gestures, Escobar knew something had happened to Arias. (RT 1178-1180.) At that moment recall sounded. (RT 1180.) At about 2:00 p.m., a search of the institution was conducted. (RT 658.) A knife was discovered in the trash can of dorm 5, and a blue levi jacket with blood on the sleeve was found under bunk 56 of that dorm. (RT 659, 660-661.) Almengor testified that this knife looked like Mata's knife. (RT 380.) Mata resided in bunk 60 of this dorm. (RT 658, 662.) A long, prison-made knife was found on the stairway to dorm 8, and a broken grass shear blade was found on the floor between the door of dorm 8 and the spot where Arias' body had fallen. (RT 668-670.) Bloody pants and shoes belonging to Almengor were found in his dorm. (RT 963-964.)

The following day, Paul Childress was approached by several inmates of Mexican descent who asked to read his magazines. He had never spoken with these inmates before and felt uneasy about their approach. (RT 283-284, 952.) Later that afternoon, he saw two of the defendants walking around in the yard below. He was frightened because he knew that they had seen him. (RT 948-949.) As he walked toward the prison control, Childress was followed by four or five inmates, one of whom appeared to be Mata. (RT 284, 949.)

Childress asked to speak to the officer in charge, and was escorted to Sergeant Mills' office. (RT 284). He told Mills what he had seen, identifying Mata and Gallegos by name.

(RT 285, 693, 947-948.) Childress identified photographs of Mata and Gallegos. (RT 285-286, 676, 681.) After looking at about seventy photographs from dorms 5 and 7, he finally identified Vargas' picture from the photos of inmates in dorm 6. (RT 681-682.)

On October 20, Gallegos was en route to another institution with Ortega and several other inmates. (RT 836-837.) Ortega testified that Gallegos admitted, "My knife broke when I hit him. We all worked out on it." (RT 838.)

At trial, Allen and Almengor made definite in-court identifications of Mata and Gallegos, but repudiated their pretrial identifications of Vargas and would not identify him in court. (RT 375, 404, 418-419, 425-426, 587, 597, 623-624.) Defendant's defense was alibi. He offered three witnesses who testified that he was on his own bed playing cards near the time that the stabbing occurred. (RT 1016, 1106, 1131.)

2. The Pretrial Identification Procedures

October 19, 1972

Allen and Almengor were both interviewed the evening of the stabbing. (RT 710, 719-720, 914, 923-924.) Allen asserted an inability to make any identifications and was not shown any photographs. (RT 719-720, 924.) Almengor asked to be shown photographs of the Mexican population on the medium side of the facility, and was shown the rollodex of about 200 photographs of all inmates on that side. (RT 397, 914, 959.) Almengor named "Bogus" Pete Nunez as one of the assailants—a name provided to him by other inmates based upon his description. (RT 399-400.

711.) Almengor identified the photograph of Nunez but was not positive saying it looked similar to the assailant. (RT 398-400, 711, 780-781.) He also tentatively identified defendant Vargas, and inmates Ramirez and Reymundo. (RT 914-915.) Almengor testified that he selected eight photographs as bearing similarity to the three assailants. (RT 401, 466.) Almengor requested larger, more recent photographs. (RT 401.) Almengor also requested a line-up, which prison officials agreed to provide; however, the line-up never occurred and Almengor never renewed his request. (RT 497, 781.)

October 27, 1972

Thereafter, major prison inmate disturbance prevented contact with Allen and Almengor for the purpose of making identifications until October 27, 1972. (RT 725, 927.)

Allen was shown a group of photographs (Exhibit 23)[1a] including pictures of Mata, Gallegos and Vargas. The names of the inmates were concealed. (RT 720.) Allen again claimed an inability to make an identification, complaining that the photographs were too old. (RT 720-721, 924.)

Almengor also viewed Exhibit 23 with the names of the inmates concealed. (RT 715.) Outside Allen's presence, Almengor again tentatively identified defendant Vargas. (RT 437, 959.) He asked for more recent photographs, feeling that the appearance of inmates represented in the photographs had changed. (RT 716, 959-960.)

[1a]Exhibits 23 and 24, the photographic spreads in question, were transmitted to this Court by the Clerk for the United States Court of Appeals for the Ninth Circuit on April 15, 1980.

Acting on this request, a number of inmates were photographed but due to a mistake by the photographer, the pictures did not come out. (RT 716.) The three defendants were photographed a second time, and other photographs were reproduced to the same size. (RT 716.) All fifteen photographs which are included in Exhibit 24 are black and white, and are the same size, have the same quality of "newness" and are of inmates of Mexican descent.

Defendant asserts that Almengor and Allen knew that new pictures of the suspects had been taken. Almengor testified that he knew Gallegos was being photographed but was unaware Mata and Vargas were with him; Allen testified at trial that he was unaware that any of the three were being photographed. (RT 444-446.) Private investigator Faulkner testified that Allen told him the following: that Allen identified defendants because they were the only ones in segregation whose pictures appeared in the photographic display and he was under Department pressure to make an identification; that he did not observe the assailants well enough to identify them; that only one assailant had a mustache and that they could have been Caucasian. (RT 1118-1119.) Allen testified that he did not recall making these statements. (RT 634, 645-646.)

Defendant also attacks the photographic display, asserting that the defendants were posed identically, and were the only ones in prison clothing wearing mustaches. Exhibit 24 contains seven other inmates with mustaches, three of whom are also wearing prison clothing: G. H. Delgado, M. S. Medina and J. A. Ortiz.

October 30, 1972

On October 30, 1972, Almengor and Allen were shown the group of photographs introduced as Exhibit 24. First Almengor was shown the display with the inmates' names concealed; he identified Mata, Gallegos and Vargas. He was able to identify Mata because "he was looking at me eye to eye, you know, at the time of the stabbing, at the time of the stabbing when he backed up." (RT 742.)

Allen was brought in next, and while Almengor stood on the other side of the room, Allen likewise identified Mata, Gallegos and Vargas as the assailants. (RT 722.) Allen testified that when he was first shown pictures he did not make any identifications because he did not want to get involved. (RT 650.) His identifications were based upon his observations at the scene, and the correctional officers did not influence his identifications. (RT 650.)

SUMMARY OF ARGUMENT

Defendant made a tactical decision to withhold objection to identification testimony at his state trial. Dissatisfied with his murder conviction, he urged on direct appeal that two eyewitness identifications were tainted by suggestive pretrial procedures. The state appellate court rejected this claim, holding these procedures to be "inherently fair." On federal collateral review of this issue a circuit court majority ignored the state appellate court factfindings as well as the district court decision and reversed the conviction, based upon its own *de novo* factfindings drawn from the same "cold" state court record.

Two doctrines which serve to limit unwarranted federal reversals of legitimate state court convictions have been violated. One is the rule which bars federal habeas corpus review to a state prisoner who has failed to raise issues in state court in compliance with state procedural rules absent a showing of "cause" and "prejudice". *Wainwright v. Sykes* 433 U.S. 72 (1977). The other is the requirement that federal habeas corpus courts defer to state court factual findings rendered after full and fair hearings. *La Vallee v. Delle Rose* 410 U.S. 690 (1973); 28 U.S.C. § 2254(d).

Defendant's tactically motivated procedural default which does not satisfy the *Wainwright* "cause" and "prejudice" standard was not excused by the state appellate court when it rejected defendant's identification contention. California's contemporaneous objection rule does not preclude this gratuitous consideration. Rather, it holds that there shall be no reversal of a judgment absent a timely and specific objection. It follows that absent a reversal or an expressed intent to forgive a procedural default, a California appellate court does not forgive this procedural default by stating reasons for the rejection of a claim.

If it is determined that the state appellate court forgave the default by reaching the merits, the state appellate court's resolution of the facts must be accorded the statutory presumption of correctness. First, it is intolerably inconsistent to hold that a state appellate court opinion has the force of removing a bar to federal review but has no substantive meaning. Next, both the letter and spirit of section 2254(d) compel the conclusion. Finally, federal law supports this result.

The Court of Appeals applied an incorrect standard in determining whether the pretrial identification procedures gave rise to a very substantial likelihood of irreparable misidentification. In following a two-part approach, first equating lack of "necessity" for use of photographic identification procedures with a finding of impermissible suggestiveness the court departed from the decisions of this Court and of the majority of other federal and state courts. It gave considerable weight to a factor which has no bearing on the reliability of the eyewitness evidence and no relation to the function of the Due Process Clause in the area of identification evidence. The second part of the Court of Appeals' "two-part approach" failed to follow the standards previously established by this Court's cases. Application of this erroneous standard predictably led the court to an erroneous result.

ARGUMENT

I

DEFENDANT'S PROCEDURAL DEFAULT SHOULD BAR CONSIDERATION OF HIS CLAIM AND AT THE LEAST, THE STATE APPELLATE COURT'S FACTFINDINGS SHOULD BE ACCORDED A PRESUMPTION OF CORRECTNESS

A. Defendant's Procedural Default Should Bar His Claim in Federal Court

At trial, defendant did not object to his in-court identifications by the three eyewitnesses, Childress, Almengor and Allen. However, the reliability of these identifications was the focal point of defendant's trial. The photographic displays were introduced into evidence; the eyewitnesses were

examined and cross-examined extensively as to their observations and the identification procedures employed; the correctional and law enforcement officials who conducted the pretrial identification procedures gave detailed accounts of them; tape recorded conversations of the three eyewitnesses with the authorities made at or near the time of these pretrial identifications were introduced into evidence; defense counsel argued in summation that these identifications were unreliable.

Why did defense counsel, who demonstrated an understanding of the legal concept of suggestive pretrial identification procedures, fail to object? The defense chose to use Almengor and Allen to impeach Childress' identification. Paul Childress approached Albert Mills, a correctional officer and told him he saw the three men who stabbed the victim. Childress knew and named defendant Mata to Mills (RT 285, 693, 947-948). Given this identification, the only available tactic was impeachment. Inconsistencies existed between Childress' testimony and that of eyewitnesses Almengor and Allen, most notably that Childress claimed a clear view of the assault but said he did not see Almengor and Allen at the murder scene. Defense counsel argued that Childress did not see Almengor and Allen because he did not witness the stabbing scene; and that Allen and Almengor were at the scene but their identifications resulted from suggestive pretrial identification procedures and were unreliable (RT 1332-1338).

Faulty identification was the heart of this defense. The thoroughness with which defense counsel explored the pretrial identification procedures, and the use of this evidence

to impeach Childress' identification leads ineluctably to the conclusion that a trial court objection was deliberately withheld, a tactical decision which satisfies the deliberate bypass test of *Fay v. Noia,* 372 U.S. 911 (1963) and, *a fortiori,* fails the "cause" and "prejudice" standard of *Wainwright v. Sykes,* 433 U.S. 72 (1977).

To excuse defendant's procedural default is to award him a windfall second trial. At trial he withheld his constitutional claim for his own benefit; dissatisfied with the verdict, he convinced the federal Court of Appeals on collateral review that the admission of those identifications requires reversal. We submit the Great Writ was not intended to reduce a state criminal trial to a "dry run."

Nor should federal courts deem the state appellate court's rejection of this claim on the merits a relief from default.

The District Court held that defendant's three claims[1] were not barred from federal review either because they were raised on direct appeal or because, on state collateral review a summary denial is assumed by federal courts to be a decision on the merits. *Thompson v. Procunier,* 539 F.2d 26, 28 (9th Cir. 1976); Petition for Writ of Certiorari, D2-D3.

The Ninth Circuit, in concert with many circuits, holds that by addressing a claim on the merits, a state appellate court is deemed to waive any procedural default by a fed-

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[1]Those three claims include: (1) admissibility of the identifications presently before this Court; (2) incompetency of counsel for failing to object to the in-court identifications; (3) a discovery issue. Only the first two issues were pursued before the Court of Appeals for the Ninth Circuit.

eral habeas applicant. *See Curry v. Wilson,* 406 F.2d 110, 111-112 (9th Cir. 1968).

This rule rests upon footnote 3 of *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294, 297, n.3, (1967):

> "The State claims that, since Hayden failed to raise the search and seizure question at trial, he deliberately bypassed state remedies and should be denied an opportunity to assert his claim in federal court. See *Henry v. Mississippi,* 379 U.S. 443; *Fay v. Noia,* 372 U.S. 391. Whether or not the Maryland Court of Appeals actually intended, when it reversed the state trial court's denial of post-conviction relief, that Hayden be afforded a hearing on the merits of his claim, it is clear that the trial court so understood the order of the Court of Appeals. A hearing was held in the state court, and the claim denied on the merits. In this circumstance, the Fourth Circuit was correct in rejecting the State's deliberate-bypassing claim. The deliberate-bypass rule is applicable only 'to an applicant who has deliberately by-passed the orderly procedure of the state courts *and in so doing has forfeited his state court remedies.*' [Emphasis in quote.] But see *Nelson v. California,* 346 F.2d 73, 82 (C.A. 9th Cir. 1965)."

The state action confronting this Court in *Warden* included a reversal of conviction by the Maryland appellate court, and a new hearing on the merits by a trial court that understood the reversal to require that Hayden be afforded a hearing on the merits of his claim. While this state action meant that Hayden had not "forfeited his state court remedies" within the meaning of *Fay v. Noia, supra,* we submit

not all action taken by a state appellate court forgives a defendant's procedural defaults.

Agreeing on this point, the Second Circuit in *Brathwaite v. Manson*, 527 F.2d 363 (2d Cir. 1975), suggested that not all kinds of state court review estop the state from asserting a "deliberate by-pass" resulting from the breach of its contemporaneous objection rule. The court explained:

> ". . . It is, of course, true that plenary consideration of such an objection by a state appellate court meets the exhaustion requirement even though, under ordinary procedural rules, the court was not obliged to give this. However, our reading of its opinion leads us to believe that the Supreme Court of Connecticut considered the point on a more limited basis, namely, whether even if petitioner's objections were sound, 'substantial injustice resulted' from receipt of the indentifications. It is doubtful whether such limited review would meet the exhaustion requirement if Connecticut provided a method for raising the federal claim in a collateral attack . . . [and] [f]or the same reason, namely, the State's failure to raise the point here, we need not consider whether *Fay v. Noia, supra*, 372 U.S. at 426-34, 438-40, 83 S.Ct.822, would be read today as relieving Brathwaite, in federal habeas, of his counsel's procedural default, even though, for the reason indicated above, we doubt whether the Connecticut Supreme Court's limited consideration of Brathwaite's objections would bring the case within the principle of *Warden v. Hayden* 387 U.S. 294, 297 n.3, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), that a state may not assert 'deliberate by-pass' when a petitioner's constitutional claims have in fact been passed upon by a state court despite breach of a contemporaneous objection rule." *Id.* at 366.

When *Manson v. Brathwaite* 432 U.S. 98 (1977) reached this Court, the merits of the identification issue were addressed because petitioner Manson asserted no claims relating to respondent's failure to make a contemporaneous objection:

> "Although no objection was made in the state trial to the admission of the identification testimony and the photograph, the issue of their propriety as evidence was raised on the appeal to the Supreme Court of Connecticut. Petitioner has asserted no claims related to the failure of the respondent either to exhaust state remedies or to make contemporaneous objections. The District Court and the Court of Appeals, each for a somewhat different reason, App. to Pet. for Cert. 7a-8a; 527 F.2d, at 366, concluded that the merits were properly before them. We are not inclined now to rule otherwise." *Id.* at 103, n. 7.

We ask this Court to find that defendant's failure to object to the in-court identifications admitted at trial results in procedural default of the issue regardless of the state appellate court's rejection of this claim on the merits.

From the standpoint of California statutory law we submit defendant's procedural default was not forgiven.

California's contemporaneous objection rule, codified in 1965, provides:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was

timely made and so stated as to make clear the specific ground of the objection or motion; and

(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." West's Annotated California Codes, Evid. Code § 353.[2]

There exists abundant California authority upholding this principle and its application to in-court identification testimony. *People v. De Santiago* (1969) 71 Cal.2d 18, 22 [76 Cal.Rptr. 809]; *People v. Robinson* (1965) 62 Cal.2d 889, 894 [44 Cal.Rptr. 762]; *People v. Colligan* (1979) 91 Cal. App.3d 846, 850 [154 Cal.Rptr. 389]; *People v. Suttle* (1979) 90 Cal.App.3d 572, 580 [153 Cal.Rptr. 409]; *People v. Boothe* (1977) 65 Cal.App.3d 685, 690 [135 Cal. Rptr. 570]; *People v. Johnson* (1974) 38 Cal.App.3d 1, 6 [112 Cal.Rptr. 834]; *People v. Hoiland* (1971) 22 Cal. App.3d 530, 541 [99 Cal.Rptr. 523]; *People v. Dobson,* 12 Cal.App.3d 1177, 1181-1182 [91 Cal.Rptr. 443]; *People v. Young* (1970) 9 Cal.App.3d 106, 109 [87 Cal.Rptr. 767];

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[2]See also Penal Code section 1259 which states: "Upon an appeal taken by the defendant, the appellate court, may without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done *after objection made in and considered by the lower court,* and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby. (Emphasis added.)"

People v. Hawkins (1970) 7 Cal.App.3d 117, 124 [86 Cal. Rptr. 428].[3]

California Evidence Code section 353 prevents an appellate court from forgiving a procedural default based upon lack of compliance with this contemporaneous objection rule. Section 353 provides in mandatory language that there shall be no reversal of a judgment absent a timely and specific objection. The California Legislature by use of this language has placed a substantive limitation on judicial review, as an appellate court cannot reverse a conviction in the absence of compliance with this statutory provision, and hence it is without jurisdiction to forgive this procedural default.

Even if a state reviewing court has the jurisdiction to reverse absent compliance with this statute, the action taken by the Fifth District Court of Appeal did not forgive defendant's procedural default. For the statute does not

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[3]The application of the contemporaneous objection rule to in-court identification testimony reflects a persistent theme running through the case law of both this Court and the California courts regarding the nature of such evidence.

> "It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness—an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart—the 'integrity'—of the adversary process.
>
> Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi." *Manson v. Brathwaite*, 432 U.S. 98, 113-114, n.14 (1977) (citations omitted). See *People v. Lawrence* (1971) 4 Cal.3d 273 [93 Cal.Rptr. 204].

preclude a court from gratuitously setting forth its reasons for rejecting a claim as meritless; rather, it provides for no reversal of the judgment. Thus, it follows that a court does not forgive a procedural default unless that court reverses a judgment despite the default. Accordingly, justifying a federal reversal of a state conviction on grounds that the state court's affirmance on the merits reflects its disinterest in enforcing state procedural rules is, at best, self-indulgent fiction.

A recent change in federal law reinforces our view. In *Wainwright v. Sykes,* 433 U.S. 72, 89 (1977), this Court rejected the deliberate by-pass standard announced in *Fay v. Noia* and acknowledged that *Fay v. Noia* put state appellate courts in a very difficult position:

> "The refusal of federal habeas courts to honor contemporaneous objection rules may also make state courts themselves less stringent in their enforcement. Under the rule of *Fay v. Noia,* state appellate courts know that a federal constitutional issue raised for the first time in the proceeding before them may well be decided in any event by a federal habeas tribunal.
>
> Thus, their choice is between addressing the issue notwithstanding the petitioner's failure to timely object, or else face the prospect that the federal habeas court will decide the question without the benefit of their views." *Id.* at 89-90.

Justice Brennan's dissent likewise perceives that collateral review afforded by *Fay* has a bearing on the states' selection and enforcement of procedural requirements, since a state concerned about its "primary factfinding role as authorized by § 2254 and *Townsend v. Sain,* 372 U.S. 293

(1963)" is forced to "liberalize" and "streamline" state rules that "otherwise might serve to bar such state participation." *Id., Dissent,* p.111, n.10.

In response to *Fay's* opening the doors to federal collateral attack, state appellate courts attempted to protect convictions from federal court scrutiny to the greatest extent possible by setting forth their reasons for the rejection of a claim. This Court closed those doors somewhat in *Wainwright v. Sykes.* This state court device, made necessary by *Fay,* should not now be transmogrified into the key which reopens those doors. For this reason, we conclude that unless a California court opinion expresses the intent to forgive a procedural default, its explanation for rejecting a claim on its merits should not be deemed a waiver of state procedural rules.

B. If The State Appellate Court Opinion Is Deemed to Waive Defendant's Procedural Default, It Must Be Accorded The Statutory Presumption Of Correctness In Federal Court

If defendant's failure to object at trial to in-court identifications is deemed forgiven by federal courts because a state appellate court addresses the merits of the claim, the state appellate court must then be treated as the factfinder for purposes of federal review. A contrary rule: (1) promotes discord between the state and federal systems by taking the incongruous position that the written words of a state appellate court have the force of removing a bar to federal review but are otherwise meaningless in federal court; (2) violates the letter and spirit of section 2254(d); and (3) contravenes existing federal law.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court demonstrated a willingness to accept the burden of state appellate court presumptive validity when the benefit of federal collateral review flows from a state appellate court decision. This assumption is implicit in the majority's observation that an appellate court passes on issues for the first time to give the federal habeas court the benefit of their views. *Id.* at 89-90. The dissent was more explicit, noting that states will relax enforcement of procedural rules "to the extent that a state desires to have input into the process of developing federal law, and seeks to guarantee its primary factfinding role as authorized by § 2254 and *Townsend v. Sain*, 372 U.S. 293 (1963)." *Id.*, dissent, at 111 n.10.

Section 2254(d) provides in part:

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct. . . ."

The literal requirements of this section are satisfied by an appellate court serving as the state's factfinder: An appellate court is a State court of competent jurisdiction; both the State and the habeas applicant are parties to an appeal; the appellate court's decision is evidenced by a written opinion; the appellate court's determination is made

after a hearing on the merits of a factual issue which includes the trial court record, the written briefs of both parties arguing the merits of a claim, and an oral argument, unless waived by both parties. *People v. Brigham* (1979) 25 Cal.3d 283, 599 P.2d 100, [157 Cal.Rptr. 905]; California Rules of Court, Appellate Rules 13, 14, 22, 23.

Likewise, the congressional intent underlying the presumption created by section 2254(d) can be satisfied only by our construction of this provision.

The Senate Judiciary Committee's report reveals the purpose of section 2254(d):

> "In their report to the Judicial Conference of the United States, the Habeas Corpus Committee, composed of Circuit Judges Simon E. Sobeloff, Phillip Forman, Luther M. Swygert, J. Skelly Wright, and Orie L. Phillips (Chairman), wrote:
>
> > 'It is the opinion of your committee that the proposed legislation, if enacted, will be a strong inducement to the States that have not already done so to provide adequate postconviction remedies and procedures and to make and keep available records of evidentiary matter in criminal proceedings to safeguard the constitutional rights of defendants.' " Senate Report (Judiciary Committee) No. 1797, Oct. 18, 1966.

Following a procedural default in a trial court, if appellate factual findings are not accorded a presumption of correctness, a state appellate court has no incentive to review a defendant's constitutional claims. Thus, a defendant is left without this state postconviction remedy and, ultimately, is left without federal review of federal claims.

Circuit courts unanimously accord presumptive validity to a state appellate court finding of a basis for an in-court identification independent of pretrial procedures.

In *United States ex rel. Harris v. State of Illinois,* (7th Cir.) 457 F.2d 191, *cert. denied,* 409 U.S. 860 (1972), petitioner objected to his in-court identification at trial, the trial court found the pretrial procedures violated *United States v. Wade,* 388 U.S. 218, 240-241 (1967), and admitted the in-court identification utilizing an improper evidentiary standard placing the burden on defendant to prove the in-court identification was not of an independent nature. Petitioner urged this error upon the Illinois Supreme Court, requesting a reversal of his conviction, or at least, remand to the trial court to hold a hearing on the independence of the in-court identification utilizing a proper evidentiary standard. The Illinois Supreme Court made no recognition of this contention other than by finding itself, after a brief review of the circumstances, that the in-court identification had an origin independent of the pretrial identification.

> "Because the Supreme Court of Illinois made such a finding of independence, this Court must determine if a reviewing court which does not hear testimony and which only has a cold record in front of it may properly make such a factual determination concerning the constitutional guarantee recognized by *Wade* . . . While we believe that the trial court is the most proper place for that determination to be made, we cannot conclude that such a resolution by a reviewing court when the record is adequate amounts in and of itself to any constitutional deprevation. We thus conclude that, so long as the record was adequate for such action,

the Illinois Supreme Court could, under *Wade* and *Gilbert,* determine if the in-court identification had an independent basis. . .

Section 2254(d) of Title 28 of the United States Code likewise focuses our attention on the appellate record. That section compels a federal court to presume as correct any determination on the merits of a factual issue made by a state court after a hearing in proceedings to which the applicant for the writ and the state were parties, unless the federal court concludes that such determination is not fairly supported by the record." *Id.* at 195-196.

Similarly, the First Circuit in *Souza v. Howard* (1st Cir. 1973) 488 F.2d 462, *cert. denied,* 417 U.S. 933 addressed appellant's contention that a state appellate court is not a state court trier of fact within the meaning of *Townsend* or a state court of competent jurisdiction on a factual issue within the meaning of § 2254(d).

"Appellant's position on this issue cannot be reconciled with the action taken by the Supreme Court in *Neil v. Biggers, supra* where it held that although a pre-trial identification might have been suggestive, nevertheless, under the totality of circumstances, the witness' in-court identification was reliable. There, in passing on the cold record, the author of the majority opinion said:

'. . . Weighing all of the factors, we find no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury.' [409 U.S. page 201, 93 S.Ct. page 383.]

Only two jurisdictions have passed directly on the subject and they have decided adversely to appellant's

> contention. They held that a reviewing court has authority to decide on the record the independent sources of in-court identification. *United States ex rel. Harris v. State of Illinois,* 457 F.2d 191 (CA7 1972); *United States v. York,* 138 U.S.App.D.C. 197, 426 F.2d 1191, 1193 (1969); *Clemons v. United States,* 133 U.S.App. D.C. 27, 408 F.2d 1230, 1248 (1968). In those cases, the courts of appeals concluded that there is no sound reason why a state appellate court, when the record is adequate, should not make findings on the issue." *Souza v. Howard, supra,* 488 F.2d 462 at 468.

This leads us to the conclusion that the presumption of correctness must apply if the state court record satisfies the requirement of § 2254(d) and *Townsend v. Sain,* 372 U.S. 293 (1963).

This Court held in *Townsend* that ". . . a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." 372 U.S. at 313. Here, neither the District Court nor the Court of Appeals held an evidentiary hearing, despite an invitation to do so by defendant. Supplemental Points and Authorities in Support of Petition for Writ of Habeas

Corpus filed April 12, 1978. Since an evidentiary hearing must be held where circumstances indicate state court factual findings may be unreliable, implicit in the failure of these courts to hold an evidentiary hearing, is their determination that the state court record is adequate as a basis for reliable factual findings.

It is quite clear, however, that the Ninth Circuit did not accept the state court's factual findings. The state found no showing of influence by the investigating officers, yet the Ninth Circuit found that "considerable pressure from both the prison officers and opposing prison factions had admittedly been brought to bear on both witnesses." Petition for Certiorari, A-10. The state's finding is supported by the record and is not clearly erroneous: while the witnesses were encouraged to make an identification, the pretrial procedures were fair and did not suggest a particular identification.

The Ninth Circuit found that the photographic display was unfair in that prior "mistaken" selections had been removed, the number of photographs drastically reduced, and only new photographs of appellant and his co-defendants were included. Petition for Certiorari, A-10. The state court concluded that the procedures were inherently fair but noted that any possibility of prejudice could be brought out given the preservation and availability of the photographs at trial. The state's finding is supported by the photographic spreads of October 27 and 30: they are not impermissibly suggestive on their face, the absence of photographs of Ramirez, Reymundo and Nunez do not render the October 30, spread suggestive since fifteen pho-

tographs remained, and defendant Mata's appearance in both exhibits does not suggest his identification, since his appearance had changed so drastically. In short, the photographic spreads did not focus attention upon defendant.

The Ninth Circuit also rejected the state's determinations that the witnesses had an opportunity to view the crime and that their descriptions were accurate. Instead, the Ninth Circuit found the identifications untrustworthy because "the violence accompanying the incident and the threat presented by the knife would have, quite likely, diverted the witnesses' attention." Petition for Certiorari, A-9. While the federal court's finding is based upon speculation, the state court's finding is supported by the record. Allen already knew Mata since, at one time, they resided in the same dorm. Almengor testified that he and Mata stared at each other, fought with each other, and communicated with each other. The lighting conditions were excellent. The witnesses described the clothing, facial hair, physical features and race of the assailants as well as the weapons they were carrying. These descriptions were accurate and sufficiently detailed. The first time a photograph reflecting defendant's true appearance was presented to the witnesses they identified him and their identifications were certain. For these reasons, we conclude that the state court's findings are supported by the record and are not clearly erroneous.

II

THE COURT OF APPEALS APPLIED AN ERRONEOUS STANDARD IN EVALUATING DEFENDANT'S CLAIM THAT HE WAS DENIED DUE PROCESS OF LAW BY USE OF PRETRIAL IDENTIFICATION PROCEDURES

The Court of Appeals held that a court should follow a "two-part approach" in determining whether a conviction based on eyewitness identification testimony should be set aside on the ground that a pretrial photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. 611 F.2d at 757. The first part of this approach involved consideration of the "*necessity* of the photographic identification procedures." *Id.* The second part of the approach involved consideration of "'whether there was a very substantial likelihood of irreparable misidentification.'" *Id.* at 758 (citation omitted).

We submit that the Court of Appeals' "two-part approach" is inconsistent with the approach developed in this Court's cases and applied by the vast majority of other federal and state courts. Its application in this case resulted in an erroneous conclusion that defendant was denied due process of law by reason of the pretiral photographic identification procedures employed.

A. The Availability of a Defendant for a Physical Lineup Does Not Render the Use of Photographic Identification Procedures Constitutionally Suspect

Since defendant Mata was a state prison inmate at the time the photographic identification procedures were utilized, the Court of Appeal quickly concluded that there was

no necessity for their use.[4] This conclusion was apparently based on tacit assumptions that "necessity" could not be shown in a situation where the suspect was in custody and that the burden of showing "necessity" was on the prosecution, even in the absence of an objection to the admission of the identification evidence. Neither of these assumptions is supported by any cogent reason. Furthermore, the court's conclusion overlooks the fact that the state court record suggests valid reasons why resort to photographic identification procedures was required. As stated in the dissenting opinion of Judge Sneed, the case arose in the unique world of a prison. 611 F.2d at 760-761. The inmate witnesses were understandably reluctant to come forward and be identified as informants. Moreover, there was evidence showing that there was a major inmate disturbance at the prison before and during the time the identification procedures were conducted. Under these circumstances, the Ninth Circuit's conclusion of lack of necessity was not supported by the record.

Discussing the weight to be given lack of necessity, the court held:

> "While lack of necessity is not a *per se* ground for rejection of the identification, we have consistently

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[4]The court gratuitously assumed from the state court record that use of photographic identification procedures, instead of a corporeal lineup, "stemmed from the reluctance of the prison officials to provide [defendant Mata] with the assistance of counsel which would be required in a line-up procedure." 611 F.2d at 759, n. 1.

This statement does not account for the fact that the right to counsel at a lineup comes into being only when a person has been formally charged with a criminal offense. *Kirby v. Illinois*, 406 U.S. 682 (1972). The initial accusatory pleading in this case was not filed until November 6, 1972 (CT 4), well *after* the identification procedures in issue here.

held that necessity is an important factor to be considered in judging the validity of the identification procedures." *Id.* at 757 (citations omitted).

Nothing in this Court's 1967 trilogy of cases regarding pretrial identification procedures, *United States v. Wade* 388 U.S. 218 (1967); *Gilbert v. California* 388 U.S. 263 (1967); and *Stovall v. Denno* 388 U.S. 293 (1967), supports a conclusion that lack of "necessity" for use of a particular procedure for pretrial identification enters into the assessment of whether the procedure actually used violated the suspect's due process rights. *Stovall* was the first case in which this Court expressly recognized that a conviction could be attacked on the ground that a confrontation between the defendant and a witness was so unnecessarily suggestive and conducive to irreparable mistaken identification as to result in a denial of due process of law. It is true that in *Stovall,* which involved the "widely condemned" practice of showing a single handcuffed suspect to a witness, the Court stressed that there was no practical alternative under the circumstances. *Id.* at 302. However, the Court's brief discussion of whether that confrontation resulted in a denial of due process did not articulate a detailed standard to be applied in determining such claims.[5]

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[5]The Court's discussion of this issue stated only that the "totality of the circumstances" surrounding the confrontation must be examined and that, under the circumstances of this case, an immediate confrontation in the witness' hospital room was "imperative." A portion of the en banc opinion of the Court of Appeals for the Second Circuit, *United States ex rel. Stovall v. Denno* 355 F.2d 731, 735 (2nd Cir. 1966), is quoted in support of this latter statement. The Court of Appeals' opinion also contained an extensive discussion of other "circumstances" which led it to reject the defendant's due process claim. These included such matters as the wit-

In short, *Stovall* does not hold, or even suggest, that lack of "necessity" for use of a particular procedure would weigh in favor of a finding that the suspect's due process rights were violated.

In *Simmons v. United States* 390 U.S. 377 (1968), the first of this Court's cases dealing with a pretrial identification by photograph, the Court framed one of the issues before it as whether the "pretrial identification by means of photographs was in the circumstances so unnecessarily suggestive and conducive of misidentification as to deny [the defendant Simmons] due process of law." *Id.* at 381. In the course of its opinion the Court noted that, despite the hazards of initial identification by photograph, "this procedure has been used widely and effectively in criminal law enforcement. . . ." *Id.* at 384. Thus, the Court was unwilling to prohibit the use of photographic identification procedures, either in the exercise of its supervisory power over the lower federal courts or as a matter of constitutional law. *Ibid.* It held that cases involving use of such procedures must be judged by the same general standard which was applied in *Stovall* to determine whether a corporeal showup prior to trial resulted in a denial of due process:

> ". . . [E]ach case must be considered on its own facts, and . . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial

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ness' opportunity to view the suspect at the scene of the crime and the lighting conditions at that time. *Id.* at 738. These circumstances were not expressly mentioned in this Court's opinion.

> likelihood of irreparable misidentification. This standard accords with our resolution of a similar issue in *Stovall v. Denno. . . .*" *Id.* at 384.

Applying this standard to the case before it, the Court noted that, in the first place, it had not been suggested that it was "unnecessary" to use photographic identification procedures. Use of such procedures was justified by the fact that the suspects were still at large when the pictures were shown to the witnesses and the fact that "[i]t was essential for the FBI agents swiftly to determine whether they were on the right track." *Id.* at 384-385. The justification for this method of procedure was "hardly less compelling than that which we found to justify the 'one-man lineup' in *Stovall v. Denno, supra.*" *Id.* at 385. The Court then noted that, in the second place, under the circumstances of the case there was little likelihood that the procedures utilized led to misidentification of Simmons. *Ibid.* In analyzing the reasons for this conclusion, the Court discussed such things as the lighting at the scene of the crime, the period of time the witnesses saw the man they later identified as Simmons, the length of time between the crime and the viewing of the photographs, the circumstances under which the photographs were shown to the witnesses and their degree of certainty regarding their selection. *Ibid.* The Court stated that, "Taken together, these circumstances leave little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some respects fallen short of the ideal." *Id.* at 385-386 (footnote omitted). It is noteworthy that, although the Court's opinion mentioned the reasons why the particular photo identification procedures were employed, it did not suggest that lack of "necessity" for use

of photo identification procedures would weigh in favor of a finding that their use violated the suspect's due process rights.

In *Foster v. California* 394 U.S. 440 (1969), a case involving two lineups and a showup involving the same defendant, the Court applied the general test of *Stovall* to reverse the defendant's conviction. It did not mention the "necessity" or lack of necessity for the use of the particular procedures.

In *Coleman v. Alabama* 399 U.S. 1 (1970), the Court considered a claim of denial of due process by reason of a stationhouse lineup which was alleged to be unduly prejudicial. The Court carefully recounted the circumstances of the witness' observation of the defendants at the scene of the crime and the circumstances of the lineup, as well as several interviews between the police and the witness in the interval between the two events. The Court concluded that the trial court could properly find that the witness' identifications were entirely based on his observations at the scene of the crime and were not induced by the conduct of the lineup. In doing so it looked at the totality of the circumstances and did not articulate a more detailed standard than that which was employed in *Simmons*.

That the presence or absence of "necessity" for use of a particular identification procedure does not enter into the determination of whether the procedures used violated a suspect's due process rights became more explicit in the Court's subsequent cases regarding the effect of pretrial identification procedures on in-court identifications.

Neil v. Biggers 409 U.S. 188 (1972), was similar to *Stovall* in that the suspect was identified at a single-person

showup. The Court's opinion is especially significant because it synthesized for the first time the general principles to be gleaned from the Court's earlier cases and articulated them with greater precision.[6] The Court stated:

> "It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' *Simmons v. United States*, 390 U.S., at 384. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process. . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Id.* at 198 (footnote omitted).

The Court then stated that:

> "What is less clear from our cases is whether . . . unnecessary suggestiveness alone requires the exclusion of evidence. While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to respondent [in order to construct a lineup], we do not think that the evidence must therefore be excluded. The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the

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[6]The *Simmons* standard had been criticized as being vague and difficult to apply. In *United States v. Cunningham* 423 F.2d 1269, 1272 (4th Cir. 1970), the Court stated that "articulation of the test describes a result but not how the result is reached."

police from using a less reliable procedure where a more reliable one may be available, and would not be based on the assumption that in every instance the admission of evidence of such confrontation offends due process." *Id.* at 198-199.

In *Manson v. Brathwaite* 432 U.S. 98 (1977), a case involving a pretrial identification made after a police officer viewed a single photograph of the defendant, the Court stated that admission of evidence concerning a suggestive and unnecessary pretrial identification procedure would not violate due process as long as the identification itself possessed sufficient aspects of reliability. No evidence was offered as to why the single photo was shown to the witness, instead of a photo array. At trial the officer testified regarding his identification of the photograph and also identified the defendant in person. This Court, in holding that evidence of the pretrial identification was properly admitted, reaffirmed the view expressed in *Neil v. Biggers* that reliability is the linchpin in determining the admissibility of identification testimony regarding confrontations and that the factors to be considered were those set forth in *Neil v. Biggers,* 432 U.S. at 114. The Court declined the opportunity to formulate an automatic rule of exclusion of evidence of pretrial identifications made following suggestive and unnecessary pretrial identification procedures. *Id.* at 110-113. In doing so the Court stressed that the standard to be applied in determining whether such evidence should be admitted or excluded was the standard of fairness required by the due process clause of the Fourteenth Amendment. *Id.* at 113. This standard protects the defendant's *evidentiary* interest in excluding unreliable evidence, an interest already protected by the right of cross-examination

and by the other incidents of our adversary system. *Id.* at 113-114. In the absence of a finding that, under all the circumstances, there has been a very substantial likelihood of irreparable misidentification, a court should admit identification evidence. "Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." *Id.* at 116. Thus, the Court concluded that the failure to use a procedure such as a photographic array, which would have enhanced the reliability of the identification testimony, went only to the weight to be accorded this evidence—not its admissibility.

The Ninth Circuit's approach is also contrary to the decisions of other circuits which have attempted to articulate definite standards to be applied in determining whether a defendant's due process rights have been violated because of pretrial identification procedures.[7]

[7]One case decided by the Court of Appeals for the Third Circuit took an approach which was somewhat similar to that of the Ninth Circuit. In *Government of the Virgin Islands v. Petersen* 553 F.2d 324 (3rd Cir. 1977), a witness was shown only two photographs, both of the same suspect. The Government conceded that this procedure was suggestive. The Court of Appeals, in determining whether this procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification, looked first to "the necessity for photographic identification as a method of zeroing in on a suspect of a serious crime still at large" and then at circumstances indicating that the witness had a substantial independent basis for making the identification. *Id.* at 327. Since the factor of "necessity" was present, the court did not discuss the effect which a finding of lack of "necessity" would have on its ultimate decision on the constitutional issue.

In *United States v. Marchand* 564 F.2d 983, 995 (2nd Cir. 1977), *cert. denied* 434 U.S. 1015, the court stated:

> "While it is preferable for law enforcement officers to use a line-up rather than photographic identification when the suspect is available, this is not a requirement."

To the same effect are *United States ex rel. Pella v. Reid* 527 F.2d 380, 384 (2nd Cir. 1975) and *United States v. Boston* 508 F.2d 1171, 1176-1177 (2nd Cir. 1974), *cert. denied* 421 U.S. 1001.

In *United States v. Evans* 484 F.2d 1178, 1184 (2nd Cir. 1973), the court, citing earlier Second Circuit cases, stated that the *Simmons* test is "a two-fold one." ". . . [T]o sustain the exclusion of identification testimony, there had to be a showing both of impermissibly suggestive procedures *and* of the substantial likelihood of misidentification. Where one or both were lacking, this court concluded that eyewitness identification testimony was to be admitted." *Id.* at 1184; see also *United States ex rel. Pella v. Reid, supra,* 527 F.2d at 383-384. The court specifically rejected a contention that "taint" is established prima facie when the government has failed to use a "more reliable source of identification" when it is able to do so. *Id.* at 1186, n. 8.

In *United States v. Gidley* 527 F.2d 1345 (5th Cir. 1976), *rehearing denied* 530 F.2d 976, *cert. denied* 429 U.S. 841, a case in which witnesses viewed a photo spread approximately two weeks before trial, the court stated that the *Simmons* standard "has developed into a two-prong test." *Id.* at 1350. The Fifth Circuit's two prongs were markedly different from the Ninth Circuit's. The Fifth Circuit identified them as:

> "First, the court must decide whether or not the photographic display was impermissibly suggestive. Second, the court must determine whether such a display created a substantial risk of misidentification at trial." *Id.* at 1350.

Discussing the first "prong" the court stated:

> "In determining whether the photographic display was impermissibly suggestive, we evaluate only the picture spread itself—whether other more desirable methods of identification were available or whether there was a compelling need for a photographic display are not relevant in the determination." *Id.* at 1350.

Similarly, in *United States v. Allison* 616 F.2d 779, 783 (5th Cir. 1980), the court stated:

> ". . .[T]he fact that there may have been time for a lineup can play no part in whether the photographic spread was impermissibly suggestive. 'Whether other more desirable methods of identification (e.g., a line-up) were available, or whether there was a compelling need for speedy identification are . . . not relevant to a determination of the impermissible suggestiveness issue.'"

Gidley has been consistently followed in the Fifth Circuit. Among the recent cases following it are *Frank v. Blackburn* 605 F.2d 910 (5th Cir. 1979) (rehearing en banc granted) and *Hudson v. Blackburn* 601 F.2d 785 (5th Cir. 1979). To the same effect is *United States v. Cueto* 611 F.2d 1056 (5th Cir. 1980).

In *United States v. Hurt* 476 F.2d 1164 (D.C. Cir. 1973), the court held that the five factors enumerated in *Neil v. Biggers* are to be considered only if the identification procedures are found to be suggestive. *Id.* at 1167-1168. The

court also held that there is no absolute constitutional right to a lineup. *Id.* at 1168.

Other cases are instructive not because they expressly state that "necessity" for use of photographic identification procedures in a particular case is irrelevant to determination of a defendant's constitutional claim, but because they determine constitutional claims regarding photographic identification procedures without any reference to the "necessity" for their use or to whether a corporeal lineup could or should have been held in their stead. For example, in *United States v. Sutherland* 428 F.2d 1152, 1155 (5th Cir. 1970), *cert. denied* 409 U.S. 1078, the court suggested a uniform procedure for the trial of cases in which a *Simmons* issue is present. Later cases in the Fifth Circuit have held that this procedure is equally applicable to all genre of identification techniques. See *Allen v. Estelle* 568 F.2d 1108, 1110-1111, n. 2 (5th Cir. 1978). To the same effect are *United States v. Sanchez* 603 F.2d 381 (2nd Cir. 1979); *United States v. Hancock* 558 F.2d 1300 (8th Cir. 1977), *cert. denied* 434 U.S. 872; and *Allen v. Moore* 453 F.2d 970 (1st Cir. 1972), *cert. denied* 406 U.S. 967.

The Ninth Circuit's approach is not supported by authorities outside the federal court system. The ALI Model Code of Pre-arraignment Procedure (1975) does not prohibit or restrict the use of photographic identification procedures to situations where photographic identification (as opposed to a corporeal lineup) is "necessary." The comments to section 160.2 of the Model Code (dealing with the conduct of identification procedures) note that, "most courts recognize no ban on photographic identification when the defendant is in custody and a lineup is feasible." *Id.* at 440.

In California, the state in which the crime occurred, it is clear that necessity for the use of photographic identification procedures plays no part in the determination of their constitutional validity. In *People v. Suttle* (1979) 90 Cal. App.3d 572, 153 Cal.Rptr. 409, a case in which a witness was asked to view a number of pictures after the defendant had been arrested, the court held that reference to the *Neil v. Biggers* criteria is not required in a situation where the pretrial identification procedure was not initially shown to be so suggestive as to lead to misidentification. The court also stated that:

> "Appellant does make the novel assertion that a corporeal lineup should have been employed since he was already in custody. He contends that 'identification from a still photograph is substantially less reliable than identification of an individual seen in person.' (*People v. Gould* (1960) 54 Cal.2d 621, 631 [7 Cal.Rptr. 273, 354 P.2d 865].) The Supreme Court in *Gould* cited Wigmore's treatise on Evidence for the quoted proposition. While we do not contradict such a source, it appears to us that the question regarding the reliability of identification procedures has always been whether the particular procedure employed is suggestive on the one hand, or reliable on the other. There is no requirement, constitutional or otherwise, that the *most* reliable technique be used. Here, since the photo identification was not suggestive, we will not go further by holding that a corporeal lineup should have been used since appellant was in custody and that his constitutional rights were violated because the police failed to do so."

Our conclusion that the Ninth Circuit was incorrect in holding that necessity for the use of photographic identification procedures enters into the determination of whether

their use in a particular case violated a defendant's due process rights is fortified by reference to the nature of the due process interest involved. This Court's cases were aimed at protection of his interest in excluding evidence which is especially unreliable. It is the likelihood of misidentification which violates his right to due process. Thus, the ultimate focus should be on the reliability of the evidence, which is the "linchpin" in determining the admissibility of identification testimony following pretrial confrontations. Necessity or lack of necessity for use of a particular pretrial identification procedure simply has no bearing on its reliability and thus should have no place in the determination of admissibility of subsequent identification testimony.

A simple hypothetical illustrates this point. Assume a case identical in all respects to the instant case, with the exception that immediately after the crime defendant Mata and his codefendants escaped from prison and remained at large until after October 27. They were then apprehended some distance away from the prison but were hospitalized because they were gravely ill. New photos of them were taken and were included in the group shown to the witnesses on October 30. These additional facts would probably convince the Ninth Circuit that it was "necessary" to use photographic identification procedures. This, in turn, would have a significant bearing on the resolution of their claims that the pretrial identification procedures violated due process. But these additional circumstances, assuming that they were not known to the witnesses, would have no conceivable bearing on their decision to select a particular photograph. They would not alter the degree of suggestiveness present

in the photographic identification procedures or the chance that an improper selection would be made.

B. The Court of Appeals Applied an Incorrect Standard in Determining Whether There Was a Substantial Likelihood of Irreparable Mistaken Identification

The Ninth Circuit's approach equates lack of necessity for the use of photographic identification procedures with impermissible suggestiveness and requires a court, without a further showing, to proceed from a finding of lack of necessity to application of the criteria for determining whether the identification evidence possesses sufficient aspects of reliability to justify its admission. But the test applied is not the one first enunciated in *Neil v. Biggers* and reaffirmed in *Manson v. Brathwaite.* Rather, the Ninth Circuit applied the test established by the United States District Court for the Eastern District of Missouri in a case decided before *Biggers* and *Manson. Parker v. Swenson* 332 F.Supp. 1225, 1230-1231 (E.D.Mo. 1971). *See also U.S. v. Field,* No. 79-1533 (9th Cir. Aug. 1, 1980).

Compare and contrast these disparate sets of factors:

(1) The opportunity of the witness to view the criminal at the time of the crime.	1. "The length of time and the conditions under which a witness was able to observe the perpetrator during the commission of the crime.
(2) The witness' degree of attention.	2. The similarity of the description given by a witness immediately after the crime to the physical characteristics of the individual he subsequently identifies.

(3) The accuracy of the witness' prior description of the criminal.

(4) The level of certainty demonstrated by the witness at the confrontation.

(5) The length of time between the crime and the confrontation.
Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

3. Conduct on the part of the police tending to focus attention of a particular subject.

4. Presence of other witnesses at the time of the improper identification and the possible prejudicial influence of one witness' opinion on another's recollection."
Parker v. Swenson 332 F. Supp. 1225, 1230-1231 (F.D. Mo. 1971).

The *Parker* test is fatally defective in that under its factors (3) and (4) are included the very elements of suggestiveness which are supposed to be placed to one side in order to evaluate the independent basis for the identification. It also fails to consider two of the five factors set forth by this Court: the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

After applying the *Parker* test, the Ninth Circuit refers to lack of "necessity" again—this time as a factor in its determination of whether use of the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. 611 F.2d at 759. In so doing, it departs even further from this Court's decisions and the decisions of the other circuits.

C. Conclusion

We share the Ninth Circuit's belief that the appropriate standard for determining the admissibility of evidence of identifications made by witnesses who have participated in pretrial confrontations with the persons or pictures of possible suspects consists of two parts. As was noted above, we disagree with the Ninth Circuit's definition of those two parts. We submit that the initial focus of inquiry should be on the pretrial confrontation and the circumstances surrounding it with a view to determining whether that confrontation was so *impermissibly* suggestive that, all other things being equal, it might reasonably be expected to lead the witness to a mistaken identification. The focus of this inquiry is on the degree of suggestion present *in the particular procedures utilized.*

This Court has stated that, as a general rule, corporeal identification procedures are normally more accurate than photographic identification procedures. *Simmons v. United States, supra,* at 386, n. 6. We have no reason to quarrel with this general statement. However, it is also true that *any* identification procedure has some greater or lesser degree of suggestiveness. Although the police may at times use "blank" identification procedures, in which the persons or pictures of suspects have not been included, a witness may well assume that they have not arranged an identification procedure merely to waste time. He may well assume that the police have some reason to believe that at least one of the individuals whose person or picture he will view might be involved in the crime. At the very least, he may assume that the individuals before him may share some characteristic which indicates that they might conceivably

be involved in the crime. Any such procedure is also "suggestive" in the sense that, for the moment at least, the witness' attention has been directed to a finite number of persons or pictures, to the exclusion of all others.

The determination of impermissible suggestiveness is not subject to generalities. It does not matter that corporeal identification proceedings may, as a general rule, be more accurate than photo identification procedures. Photo identification procedures may be scrupulously fair. A physical lineup may consist of a giant and seven dwarves. Generalities simply do not assist in the resolution of these particular cases.

Only if it appears that the identification procedures actually used were impermissibly suggestive in that they singled out a particular suspect in such a manner as to give rise to a substantial likelihood that he *could* be misidentified does it become necessary for a court to apply the second part of the test for determining whether there has been a denial of due process. This part of the due process test is also a practical one, based on the facts of the particular case. It asks whether in fact there has been a very substantial likelihood of misidentification. The factors enunciated in *Neil v. Biggers* and *Manson v. Brathwaite* are considered at this point, as well as any other circumstances bearing on the likelihood of misidentification.

Thus, we adhere to the standard enunciated by the Second Circuit in cases such as *United States v. Evans, supra,* and by the Fifth Circuit in cases such as *United States v. Gidley, supra,* as being faithful and practical applications of the teachings of this Court's cases.

Such a standard is in harmony with this Court's general statement in *United States v. Ash* (1973) 413 U.S. 300, 321:

> "We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required."

It is also in harmony with the notion that the due process clause, to the extent that it should be applied to exclude identification evidence, should be result-oriented. Thus, it should be applied to exclude otherwise admissible evidence only when it appears that there has been a very substantial likelihood of irreparable misidentification. As stated by the Chief Justice in his dissenting opinion in *Brewer v. Williams* (1977) 430 U.S. 387, 425:

> "Recognizing that '[i]t is the likelihood of misidentification which violates a defendant's right to due process,' *Neil v. Biggers* [*supra,* at 198], we exclude evidence only when essential to safeguard the integrity of the truth-seeking process. The test, in short, is the reliability of the evidence."

For the reasons stated in our previous argument, we believe that the Ninth Circuit's application of an erroneous standard led it to an erroneous result and that application of the proper standard must lead to a conclusion that defendant Mata was not denied due process by reason of the admission of identification evidence at his trial.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the Court of Appeals should be reversed and defendant's petition for writ of habeas corpus be denied.

Dated: August 26, 1980.

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No. 79-1601

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GEORGE SUMNER, Warden of the California State Prison at San Quentin,

Petitioner,

v.

ROBERT MATA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

Whether a party may litigate procedural questions before this Court that have either never been raised below or have been raised only after decision in the Court of Appeals and therefore have not been reached by the Court of Appeals.

II

Assuming such questions can be decided by this Court, whether a defendant convicted in state court is barred from obtaining review on federal habeas corpus under *Wainwright v. Sykes*, 433 U.S. 72 (1977), where, despite a failure to object at his trial in state court, the state appellate court reaches and decides his contentions on their merits.

III

Again assuming the question can be reached in this Court, whether a federal Court of Appeals' conclusion that an identification procedure is unduly suggestive and so unreliable as to offend federal due process constitutes a mixed question of fact and law which a federal court is obliged to decide independent of any state court determination, or whether it is a finding of fact as to which a federal court must, under 18 USC section 2254(d), defer to state court.

IV

Whether under this Court's totality of the circumstances test in eyewitness identification cases, a court may consider the unnecessary failure of police officials to conduct a line-up when the identifying witness insists that a line-up is the only reliable method of identification.

V

Whether, under this Court's totality of the circumstances test in eyewitness identification cases, a court may consider conduct of the police tending to focus the witness' attention on a particular subject.

VI

Whether the identification procedures utilized in this case were unduly suggestive and unreliable.

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Manson v. Brathwaite, 432 U.S. 98 (1977) ..... *passim*

Mason v. Balcom, 531 F.2d 717 (5th Cir. 1976) 18

Mata v. Sumner, 611 F.2d 754 (9th Cir. 1979) cert. granted, 65 L.Ed.2d 1139 (1980) 23

Mock v. Rose, 472 F.2d 619 (6th Cir. 1972), cert. denied, 411 U.S. 971 (1973) ..... *passim*

Neil v. Biggers, 409 U.S. 188 (1972) 34

Palmer v. Peyton, 359 F.2d 199, 201 (4th Cir. 1966) 25

Parker v. Swenson, 332 F.Supp. 1225 (E.D. Mo. 1971), cert. denied, 409 U.S. 1126 (1973) 34

Partida v. Castenada, 524 F.2d 481 (5th Cir. 1975), affirmed sub nom. *Castenada v. Partida*, 430 U.S. 482 (1977) 14

People v. Andrews, 14 Cal.App.3d 40, 92 Cal.Rptr. 49 (1949) 16

Cases, continued: Page

People v. Chambers, 231 Cal.App.2d 23, 41 Cal.Rptr. 551 (1964) 16

People v. Ibarra, 60 Cal.2d 460, 340 Cal.Rptr. 863 (1963) 16

People v. Kramer, 227 Cal.App.2d, 38 Cal.Rptr. 487 (1964) 16

People v. Mahoney, 201 Cal. 618 (1927) 16

People v. Matteson, 61 Cal.2d 466, 39 Cal.Rptr. 1 (1964) 16

People v. Underwood, 61 Cal.2d 113, 37 Cal.Rptr. 313 (1964) 16

Rummel v. Estelle, ___ U.S. ___, ___, n.7, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980) 12

Simmons v. United States, 390 U.S. 377 (1968). . . . . *passim*

Smith v. Coiner, 473 F.2d 877 (4th Cir. 1973) cert. denied, 414 U.S. 1115 (1974) 33

Smith v. Digmon, 434 U.S. 332 (1978) 11

Stovall v. Denno, 388 U.S. 293 (1967) 23, 32, 33

Townsend v. Sain, 372 U.S. 293 (1963) 18

United States v. Allison, 616 F.2d 779 (5th Cir. 1980) 27

United States v. Ballard, 423 F.2d 127 (5th Cir. 1970) 27

United States v. Barnes, 610 F.2d 888 (D.C. Cir. 1979) 17

United States v. Baxter, 492 F.2d 150 (9th Cir. 1973) 26

United States v. Calhoun, 542 F.2d 1094 (9th Cir.), cert. denied, 429 U.S. 1064 (1976) 26

United States v. Cook, 608 F.2d 1175 (9th Cir. 1979), cert. denied, 100 S.Ct. 706 (1980) 23

United States v. Crawford, 576 F.2d 794 (9th Cir.) cert. denied, 439 U.S. 851 (1978) 26

Cases, continued: Page

United States v. Dailey, 524 F.2d 911 (8th Cir. 1975) 26, 36

United States ex rel. Kirby v. Sturges, 510 F.2d 397 (7th Cir.), cert. denied, 421 U.S. 1016 (1975) 25, 27

United States v. Field, ___ F.2d ___ (No. 79-1533, 9th Cir. August, 1980) 22, 36, 39, 42

United States v. Lovasco, 431 U.S. 783 (1977) 11, 18

United States v. Marchand, 564 F.2d 983 (2d Cir. 1977), cert. denied, 434 U.S. 1015 27

United States v. Mears, 614 F.2d 1175 (8th Cir. 1980) 35

United States v. Peele, 574 F.2d 489 (9th Cir. 1978) 26

United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977) 26

United States v. Sanchez, 603 F.2d 381 (2d Cir. 1979) 35

United States v. Santana, 427 U.S. 38 (1976) 11

United States v. Sutherland, 428 F.2d 1152 (5th Cir. 1970), cert. denied, 409 U.S. 1078 27

United States v. Valdivia, 492 F.2d 199 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974) 26

United States v. Wade, 388 U.S. 218 (1967) 35, 42

United States v. Williams, 615 F.2d 585 (3d Cir. 1980) 17

Wainwright v. Sykes, 433 U.S. 72 (1977) ..... *passim*

Warden v. Hayden, 387 U.S. 294 (1967) 14

West v. Louisiana, 478 F.2d 1026 (1973) 18

Texts:

Borchard, *Convicting the Innocent* (1933); repr. 1961) 52

Texts, continued: Page

Buckhout, *The Mistaken Seven: Eyewitness Identification of the "Gentleman Bandit"*, 7 Crim. Defense 5 (1980) 52

Comment, *Photographic Identification: The Hidden Persuader*, 56 Iowa L. Rev. 408 (1970) 28

Frankfurter, *The Case of Sacco and Vanzetti* (1927; repr. 1962) 52

Grano, *Kirby, Biggers and Ash: Do Any Constitutional Safeguards Remain Against Convicting the Innocent?* 72 Mich. L. Rev. 717 (1974) 28, 29

Libling, *The Use of Photographs for the Purpose of Identification*, 1978 Crim. L. Rev. 343 28

Loftus, *Eyewitness Testimony* (1979) 41, 48, 49, 52

Napley, *Problems of Effecting the Presentation of the Case for a Defendant*, 66 Col. L. Rev. 94, 99 (1966) 42

Sussman, Sugarman & Zavala, *A Comparison of Three Media Used in Identification in Personal Appearance Identification* XI-7 A. (Zavala Ed.) (1970) 29

Uelman, *Testing the Assumptions of Neil v. Biggers: An Experiment in Eyewitness Identification*, 8 Crim. L. Bull. 358 (1980) 48, 52

Wall, *Eyewitness Identification in Criminal Cases* 48 ..... 28, 42, 45, 50

Williams and Hammelman, *Identification Parades* 1963 Crim. L. Rev. 479 28

Yarmey, *The Psychology of Eyewitness Testimony* 154 (1979) 36, 49

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-1601

GEORGE SUMNER, Warden of the California State Prison at San Quentin,

Petitioner,

v.

ROBERT MATA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

Respondent accepts the recitations in the Brief for Petitioner covering the opinion below, the jurisdictional basis for this Court hearing the case, the constitutional and statutory provisions involved, and the chronology of the statement of proceedings in state and federal court.

STATEMENT OF THE CASE

A. Statement of Facts

Respondent, Salvador Vargas and David Gallegos were convicted of first degree murder in Kern County Superior Court for the killing of Leonard Arias while all were inmates at the California Correctional Institute at Tehachapi, California (hereinafter "Tehachapi"). The killing was alleged to have occurred on October 19, 1972.

No murder weapon was ever found, and no physical evidence existed linking any of the defendants to the murder.[1] The prosecution's case rested almost entirely on the testimony of three inmates, Rigoberto Almengor, Florence J. Allen and Paul Childress, who claimed to have witnessed the homicide.

The identifications made by the witnesses occurred after a series of photo identification sessions, which are discussed in detail in the body of the argument of this brief. The evidence presented at trial was as follows.

Childress was confined to the same dormitory in Tehachapi as Arias, Almengor and Allen. He testified that on October 19, 1972 as he emerged from the bathroom in the dormitory he saw a scuffle involving *only* Arias and the three defendants. He testified that he knew both Almengor and Allen and that he did not see either one of them at the scene. (J.A. 29; RT 328.) Although he claimed to have a clear view of the incident, he saw no knives being wielded, and in fact did not know a knife fight was in progress until he saw

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[1] Although clothes, a knife, and grass shears were found (RT 659, 660-61) no testimony was presented linking these items to the defendants.

a knife fall to the floor (J.A. 29-30; RT 330). He testified that upon seeing the incident, he went back to his own bunk, put away the belongings he had taken with him to the bathroom and stood up. This all consumed about two or three minutes and only after this did he see the assailants fleeing the scene (J.A. 31; RT 346). At first Childress said nothing to anyone regarding what he had seen. However, after being approached by a group of males of Mexican descent, Childress became nervous and went to the authorities (RT 283-84, 948). He indicated the nickname and the first name of two of the people he thought had committed the crime (J.A. 21; RT 285) and the officer in charge took single pictures of Mata and Gallegos out and asked Childress if these were the men he had in mind (RT 676). Childress agreed that they were and then went through a rolodex of inmate pictures and chose Vargas as the third assailant. At trial, Childress indicated that on October 19 Gallegos did not have a mustache (J.A. 24; RT 287). Exhibit 24 which includes a photograph of Gallegos taken on October 27 shows Mr. Gallegos with a mustache. Childress was placed in segregation after he identified the defendants. While there he saw all three defendants (J.A. 25; RT 289).

Childress' story is impeached in important respects by Almengor and Allen both of whom testified that they were "shoulder to shoulder" with Arias at the time of the killing. In addition, Gary Darke, who occupied the bunk nexg to Childress at the time of the incident testified that when the stabbing occurred he and Childress were actually playing cards and were out of the view of the killing (RT 1093).

Almengor testified that he was on parole at the time of the trial (J.A. 31; RT 366). He did not go to the

investigating authorities willingly but was taken into their custody as a suspect. After the killing he found his clothing covered with blood (J.A. 47; RT 385). At that point he went back to the area of his own bed, changed immediately into a full set of different clothes, took off his shoes, and threw them a few bunks away. He then went into the restroom, washed his hands, using a ruse with one of the guards to do so. (J.A. 48; RT 385-86.) When the officers searched the dormitory and found the pants which had been discarded, Almengor still did not come forward. He waited until guards tried his pants on sixteen other inmates, and ultimately proved to fit only him before he volunteered that he would be "glad" to assist the officers. (J.A. 58; RT 396.) Almengor indicated that he was near-sighted and not wearing his glasses. (J.A. 67; RT 450.) He also had a long history of glue sniffing and had in fact been apprehended on three separate occasions sniffing glue while at Tehachapi (J.A. 66; RT 449).

Almengor stated that the witnesses standing by the bulletin board turned around "real fast" (J.A. 37; RT 376.) Almengor took a few steps away from the victim and as the attack started the only inmate he was looking at was the "third man," the "tall one" thought to be Vargas. As the fight broke out he saw the third individual "slooped and pulled away" (J.A. 40-1; RT 379-80), saw stabbing motions being made quickly at Arias and heard Allen screaming for people to come help (J.A. 46; RT 383). At this same moment, Almengor testified that Mata appeared to "rush me with a knife" (J.A. 40-1; RT 380). Almengor defended himself by blocking the blow and throwing a kick which pushed the assailant quickly to the door at the other end of the corridor at least six feet away (J.A.

41; RT 380). At this point Almengor indicated that he looked eye to eye at his assailant. (J.A. 115; RT 742.) The attacker then turned and ran out, his back toward Almengor.

Allen was a member of the Nuestra Familia (J.A. 180; RT 1157). He was also on parole at the time of the trial (RT 583). He testified that he was right next to Arias when the incident happened (J.A. 75; RT 586) and was distracted at the time of the attack. His testimony was that he was "glancing up" while buttoning his denim jacket when the attack on Arias broke out (J.A. 79, 75; RT 612, 586). Once the fight started, Allen's main purpose was in his words "trying to keep from getting killed." (J.A. 75; RT 586.) He stated that he did not see Mata or Gallegos "that good" (J.A. 76-7; RT 587) since the third man, identified as Vargas, leaped at Allen and jabbed his knife toward him, cutting Allen's sleeve and scratching the skin on his forearm. Allen stepped back a few steps and started yelling for help (RT 389). Allen testified that his attention during the fight was drawn to the man with the big knife who "pretty well occupied [his] attention" and that he was "looking at the knife" rather than the face of the assailant (J.A. 80; RT 614).

All three witnesses and all three defendants were placed in segregation after the incident. They remained in segregation at least until the 30th of October. During this period of time inmates were led out to an exercise area one at a time and could be viewed by the other segregated inmates. (RT 361, 441, 594.) The prosecution also called Carlos Ortega who testified that Mata and Vargas had approached him prior to the arrival of Arias and asked that Arias be "hit." He testified that he tried to "cool it" with Mata and Gallegos. Ortega

admitted that he had committed perjury on other occasions in court, that he had himself stabbed people (RT 882) and that he had testified in another proceeding in Los Angeles and that in that proceeding the subject of the October 19, 1972 Tehachapi killings had come up and that Ortega had never mentioned that any of the three defendants had been involved in the incident. He had, however, named "Bogus Pete" Nunez, a figure initially identified by Almengor, as one of the killers (RT 872). Moreover, Ralph Renteria, chairman of a prison-sanctioned organization for inmates of Mexican descent disputed Ortega's entire account of the history of the Mexican Mafia, of Ortega's knowledgability of the Mexican Mafia, and of Ortega's self proclaimed role as "chief" of the Mexican Mafia (RT 1067).

The defense called the following witnesses: Jerry Wayne Sanford who testified that he was asleep in his bunk when he was awakened about 1:45 p.m. and told that there had been a stabbing. When he woke up Mata was sitting on Mata's own bed playing chess with an inmate with whose name he believed to be Russell (RT 1016). In his closing argument the district attorney admitted that "I don't really have anything damaging to say about [Sanford]" (J.A. 180; RT 1279).

Similarly William Bustills about whom the district attorney also conceded he had no adverse information (J.A. 180; RT 1279) testified that after lunch and before recall on October 19 Mata was playing cards about three bunks away from Bustills' bunk with a "white boy" named "Russ." (RT 1106.) In addition, the defense called a court-appointed licensed investigator named James Leon Faulkner who recounted an interview he had had with Allen on November 22,

1972, in which Allen had indicated that the jackets of the assailants were pulled up and the hats were pulled down, that only one had a mustache, that he was unable to identify any of them and that indeed they might even have been Caucasian. (J.A. 175; RT 1117.) According to Faulkner, Allen had "stated that at this time, that from the time the incident occurred until the time I interviewed him, that he had never gotten a look; he had never been able to observe any of the assailants to the extent where he could identify them." (J.A. 176; RT 1118.) Faulkner stated that Allen had told him that he had seen all three defendants being taken out of segregation together at one time to be rephotographed and that "he assumed that since they were the only ones in segregation that they were on the chart, the photographic chart he was shown at a later time—that they must be the ones that did it." (J.A. 177; RT 1119.) Faulkner further stated that Allen had told him that he was "due to be released, and that if he didn't cooperate with the people from the Department of Corrections that he wouldn't be released at his date that he was due." (J.A. 178; RT 1119.) Mata also called Reuben Leon Schoo who confirmed the testimony of the two prior inmates that Mata was in his dorm playing chess with Russell at the time of the incident. (RT 1128 *et seq.*)

SUMMARY OF ARGUMENT

Petitioner's Procedural Arguments

Petitioner has failed to present either of his procedural arguments to the Court of Appeals in a timely fashion. Under principles long-settled in this Court, petitioner is therefore not entitled to review of the procedural questions he tenders here. Not until the

petition for writ of certiorari did petitioner contend that *Wainwright v. Sykes*, 433 U.S. 72 (1977) precluded review of the eyewitness identification contention respondent advanced in the lower courts. The argument that 18 USC section 2254(d) precluded the federal courts from relitigation of what petitioner deems to be state court findings of fact was not presented to the Court of Appeals until the Petition for Rehearing. Under these circumstances petitioner's arguments should not be considered by this Court.

On their merits the procedural arguments have no substance. Where a state appellate court reaches the merits of a contention that was not the subject of an objection at trial, the state court has construed state law to forgive the failure to object. No principle of comity or federalism requires a federal court to invoke the state's contemporaneous objection rule under such circumstances.

Even if petitioner's argument based on 18 USC section 2254(d) could be reached on its merits, that section has no relevance here. Section 2254(d) requires federal court deference only to a state court's finding of primary historical fact. It does not require deference to the conclusions to be drawn from those facts. In this case the Court of Appeals' decision involved only legal conclusions such as whether the procedures used were "suggestive" or whether the witnesses were "unduly influenced" or whether the identification process was constitutionally "fair."

Petitioner's Arguments on the Merits

Petitioner has adopted a wooden approach in the face of the flexible rules established by this Court in eyewitness identification cases. In *Manson v. Brathwaite*, 432 U.S. 98 (1977) and *Neil v. Biggers*, 409 U.S. 188 (1972) this Court required that all factors considered by a court passing on the constitutional propriety of a particular eyewitness identification be tied to reliability. But in passing on those factors *all* circumstances related to reliability were to be considered. Notwithstanding this test, petitioner has argued that in no case should a court be permitted to consider the unnecessary failure to conduct a line-up, or the conduct of police officers conducting the identification which might have focused the witness' attention on a particular individual, or the presence of other witnesses at the time the identification is made. Petitioner's approach is at odds with the "totality of the circumstances" test adopted in *Manson, Neil* and earlier cases in this Court.

This case illustrates the point. For example, here one of the witnesses insisted he could not make a valid identification from photographs but had to see a line-up. Under circumstances such as that, it is obvious that the failure to conduct a line-up is relevant to the question of reliability. The witness himself is saying that the photographs are in effect unreliable and that a line-up would be reliable. That fact surely is relevant and ought to be considered by a court.

The fact is, the Court of Appeals had no choice but to reverse this conviction. The identification procedures were unnecessarily suggestive and led to an extraordinarily unreliable identification.

ARGUMENT

I

BECAUSE PETITIONER HAS FAILED TO RAISE HIS PROCEDURAL ARGUMENTS IN A TIMELY FASHION BELOW, THIS COURT SHOULD NOT CONSIDER THEM. IF THE COURT DOES REACH THE MERITS OF PETITIONER'S PROCEDURAL ARGUMENTS THEY SHOULD BE REJECTED.

Petitioner's handling in the lower courts of the two procedural arguments he tenders here has been inconsistent, confused, and misleading to those courts. His first procedural argument is raised for the first time in this Court and his second was not presented in the Ninth Circuit until after the case had been decided. Under these circumstances, this Court should not consider the arguments.

Although petitioner's failure to preserve his procedural arguments disposes of them, we nonetheless demonstrate that on their merits the claims have no substance. With respect to petitioner's first argument we see that the state Court of Appeal did review respondent's federal constitutional claim on its merits and therefore that no principle of comity or federalism is served by a federal court declining to review the claim. With respect to petitioner's second procedural argument that the Ninth Circuit did not defer sufficiently to state court findings of fact we point out that the decision here under review resolved a question of "mixed law and fact" which the federal courts were obliged to decide independent of any state court determination.

We treat petitioner's procedural arguments *seriatim*.

A. Trial Counsel's ailure to Object to the Photo Identifications n State Court.

Petitioner first contends that trial counsel's supposed deliberate tactical choice not to object to the suggestiveness of the photo identifications at trial should be deemed a failure to exhaust remedies notwithstanding the fact the California Court of Appeal disposed of the identification question on its merits. Before demonstrating that the contention enjoys neither the support of logic nor the benefit of precedent, we point out that this is the first court anywhere during this litigation that has ever been presented with this argument. Under these conditions the issue is not properly before this Court and should not be considered by it.

1. Because the Failure to Object Was Never Argued Below as a Basis for Finding There Had Been No Exhaustion, it Cannot be Advanced Here.

The rule in this Court is that issues that have not been briefed and argued in the courts below will not be decided for the first time in the Supreme Court in the absence of exceptional circumstances. *See, e.g., United States v. Lovasco*, 431 U.S. 783, 788-89 n.1 (1977); *United States v. Santana*, 427 U.S. 38, 41 n.2 (1976); *Dorszynski v. United States*, 418 U.S. 424, 431 n.7 (1974); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957). *See also Smith v. Digmon*, 434 U.S. 332, 334 (1978) (Rehnquist, J. concurring).

In *Jenkins v. Anderson*, ____ U.S. ____, 65 L.Ed.2d 86 (1980) this Court recently applied this principle to the identical contention being advanced here. There as here the state sought to argue that trial counsel's failure to object in state court precluded federal review under *Wainwright v. Sykes*, 433 U.S. 72 (1977). Noting that

the state had failed to raise the *Sykes* question in the lower federal courts, this Court declined to review it on certiorari, stating:

> "Considerations of judicial efficiency demand that a *Sykes* claim be presented before a case reaches this Court. The applicability of the *Sykes* 'cause' and 'prejudice' test may turn on an interpretation of state law. *See Rummel v. Estelle,* ____ U.S. ——, ——, n.7, 63 L.Ed.2d 382, 100 S. Ct. 1133 (1980). This Court's resolution of such a state law question would be aided significantly by the views of other federal courts that may possess greater familiarity with [state] law. Furthermore, application of the 'cause' and 'prejudice' standard may turn on factual findings that should be made by a District Court. Accordingly, we do not consider the *Sykes* issue in this case." (65 L.Ed.2d at 92 n.1.)

Jenkins is controlling here. In their return to the District Court's order to show cause, the Attorney General made no argument that trial counsel's failure to object in state court in any way affected his right to be in federal court on the identification question. (J.A. 00, Return pp. 1-2, 6-10.) The only context in which trial counsel's failure to object was noted by the Attorney General was in connection with Mata's argument that he had been denied the effective assistance of counsel because no effort had been made at trial to suppress the identification of witnesses Almengor and Allen (*see* J.A. 184, 203, Petition for Writ of Habeas Corpus, U.S. District Court, 16-18; Return p. 14.) In that connection the Attorney General made no argument that failure to object had worked a "procedural default" against Mata, but only that his failure to raise the *incompetence issue* on the direct appeal of his conviction to the California

Court of Appeal was fatal in Federal Court. This argument, ultimately rejected by the District Court and never renewed in the Ninth Circuit, was of course different from the argument petitioner now makes here.

Not only did the Attorney General fail to present the lower courts with the argument he now makes here, when requested by the District Court to certify whether Mata had exhausted state remedies, the Attorney General indicated: "we state that petitioner has exhausted state remedies." (*See* J.A. 206, Declaration of Jamie Jacobs-May.) In the same document the Attorney General cited *Wainwright v. Sykes* to the District Court and argued from it for the first time that *Sykes* foreclosed review of the competence issue and of another issue Mata has since abandoned. Thus, although petitioner was aware of *Sykes* and made arguments from it, he certified to the District Court that there had been sufficient state court exhaustion and he deliberately made no *Sykes* argument on the identification question.

When the case reached the Ninth Circuit no argument was presented in appellee's brief or in the Petition for Rehearing and Suggestion for Rehearing En Banc that trial counsel's failure to object in any way precluded the federal courts from reaching the merits of the identification claim. *Sykes* was not cited at all in the Ninth Circuit and no argument was presented on any issue in that Court which even suggested there had been a procedural default against Mata in state court. The first appearance of the argument in any form therefore was before this Court on the petition for writ of certiorari.

As this Court noted long ago "This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927). There are no exceptional circumstances in this case. Petitioner had had every opportunity to present his claims below and has not availed himself of those opportunities. This Court should decline to reach the question on its merits.

2. Assuming the Court Can or Should Hear the Argument on its Merits, There is No Principled Reason to Hold that a Defendant Fails to Exhaust His State Remedies When a State Appellate Court Reaches a Federal Constitutional Question Which Was Not the Subject of Objection in State Trial Court.

As petitioner appears to recognize, the position he urges here on the merits does not enjoy the support of authority. For the cases in this Court strongly suggest, and the cases in the Courts of Appeal directly hold that state exhaustion requirements are satisfied when a state appellate court has passed on the merits of a claim even though the claimant had failed to object in the trial court. *See, e.g., Warden v. Hayden*, 387 U.S. 294, 297 n.3 (1967); *Fay v. Noia*, 372 U.S. 391, 439 (1963); *Irvin v. Dowd*, 359 U.S. 394, 406 (1959); *Curry v. Wilson*, 405 F.2d 110, 112 (9th Cir. 1968), *cert. denied* 397 U.S. 973 (1970); *Hale v. Henderson*, 485 F.2d 266, 269 (6th Cir. 1973), *cert. denied* 415 U.S. 930 (1974); *Partida v. Castenada*, 524 F.2d 481, 483 (5th Cir. 1975), affirmed sub nom. *Castenada v. Partida*, 430 U.S. 482 (1977). The position adopted by these cases is bottomed on those principles of comity which formed the basis for the exhaustion requirement in the first

place. As this Court noted in *Fay v. Noia, supra*, "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct the constitutional violation." It follows that where the state court *has* passed upon the merits of a claim, it has seized the opportunity to correct the constitutional violation and that no principle of federalism or comity requires the federal court to stay its hand. In such a situation the state courts have pronounced themselves untroubled by any defects in state procedure and in so doing have, in effect, authoritatively construed a question of state law. In other words, whether the failure to object in state trial court forecloses review on the merits in a state appellate court is obviously a question of state law.

Petitioner seeks to avoid the impact of these cases by urging this Court to read the State Court of Appeal's ruling on the merits of the identification question as a mere "gratuity." (Brief for Petitioner, p. 22.) Relying on California Evidence Code section 353, petitioner contends that since under that statute a California appellate court cannot reverse a conviction where there has been no objection below, the State Court of Appeal cannot "forgive" the procedural default created by the failure to object at trial. Unfortunately, petitioner's predicate is wrong as a matter of state law.

Petitioner's argument depends on the premise that failure to object is a jurisdictional prerequisite to reversal in California. For so long as the state court had the *power* to reverse, it had the power to "forgive" the default in failing to object. It is quite clear that the failure to object in trial court is not a jurisdictional prerequisite to reversal in California. While the usual

rule is that an objection is required, the rule has numerous exceptions. *See, e.g., People v. Andrews*, 14 Cal.App.3d 40, 92 Cal.Rptr. 49 (1949) (prosecutorial misconduct); *People v. Mahoney*, 201 Cal. 618, 621 (1927) (misconduct of trial judge); *People v. Ibarra*, 60 Cal.2d 460, 34 Cal.Rptr. 863 (1963) (counsel ignorant of the law); *People v. Kramer*, 227 Cal.App.2d, 38 Cal.Rptr. 487 (1964) (defendant representing himself); *People v. Chambers*, 231 Cal.App.2d 23, 41 Cal.Rptr 551 (1964) (one lawyer representing two clients); *People v. Underwood*, 61 Cal.2d 113, 126, 37 Cal.Rptr. 313 (1964) (involuntary confession). Indeed, the California State Assembly Committee's comment to Evidence Code section 353 specifically notes that the section "is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law. *People v. Matteson*, 61 Cal.2d 466, 39 Cal.Rptr 1 (1964)."

In this case the Attorney General pointed out to the state Court of Appeal that there had been a failure to object in the trial court and that that failure should foreclose review on the merits on the direct appeal. (*See* J.A. 181, Respondent's Brief in California Court of Appeal Case No. 5 Crim. 1735, p. 9.) Fully aware of that argument, the State Court of Appeal nonetheless reached the merits. When a state appellate court speaks directly to the merits of an appellant's claim and in no way acknowledges his failure to object in the trial court we submit that it has resolved the objection question as a matter of state law. In such a circumstance this Court should treat the state court opinion as exactly what it purports to be: a ruling on the merits. It is difficult to see how the interests of either federalism or comity are

served by this Court's dismissing as a "gratuity" what to every outward appearance is a state court ruling on the merits. To do so inevitably draws this Court into resolving questions of state law contrary to the state courts themselves.[2]

B. The Court of Appeal's Alleged Failure to Defer to State Court Findings of Fact.

Petitioner has pursued his argument that the federal courts were required to defer to state court findings of fact in much the same "on-again-off-again" fashion as he has his first procedural argument. Although the argument was presented to the District Court (Return, p. 6), it was not offered in the Ninth Circuit until after the Court of Appeals had decided the case. Only at that point was the 2254(d) argument tendered (Petition for Rehearing and Suggestion for Rehearing En Banc, p. 12) and neither the majority nor the dissent in the Court of Appeals ever reached or discussed the contention. Presenting issues for consideration in this cavalier fashion is not, we submit, conducive to orderly decision-making. When an issue is withheld from the

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[2] Even if there was no state exhaustion, counsel's failure to object was not tactically based and therefore constituted "cause" within the meaning of *Sykes*. (*See e.g., United States v. Williams*, 615 F.2d 585, 591 (3d Cir. 1980); *United States v. Barnes*, 610 F.2d 888, 894 n.32 (DC Cir. 1979). The only detail with which Almengor and Allen contradict Childress is that Childress failed to place them at the scene. But there are a variety of other ways they could have been placed at the scene. For example, both told officers they were present and at least in Almengor's case the admission would have been admissible as against his interest. In addition other inmates could have placed them both there since both admitted they were walking shoulder to shoulder with Arias.

Court of Appeals until the case is decided and that Court does not decide the question, this Court has in the past declined to reach it as well. *See United States v. Lovasco, supra*, 431 U.S. at 788-89 n.1. We urge the Court to follow that course here.

In any event, it is perfectly obvious that the Ninth Circuit did not fail to presume as correct any "findings of fact" that may have been made in state court. The state court findings of fact which 18 USC § 2254(d) presumes to be correct are "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators.' . . . So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense." *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963) quoting from *Brown v. Allen*, 344 U.S. 443, 506 (1953) (Frankfurter, J. concurring).

While deference to a state court's determination of the existence or non-existence of primary, historical facts may be dictated by principles of comity and judicial economy (*see West v. Louisiana*, 478 F.2d 1026, 1031-32 (1973) affirmed and adhered to in relevant part in 510 F.2d 363 (5th Cir. 1975 (en banc)), similar considerations obviously do not govern conclusions of federal law drawn from those facts. In the words of the Fifth Circuit in *West, supra*, "comity does not govern the application by federal courts of their independent judgment as to federal law. That is their obligation in all cases. . . ." This view has been uniformly followed in the lower federal courts. *See, e.g., Mason v. Balcom*, 531 F.2d 717, 729 (5th Cir. 1976); *Imbler v. California*, 424 F.2d 631 (9th Cir.

1970), *cert. denied* 400 U.S. 865; *Lamb v. Zahradnick*, 452 F.Supp. 372 (D. Va. 1978).

Consistent with this view, this Court has held that whether counsel undertook multiple representation is not a question of fact (*Cuyler v. Sullivan*, ____ U.S. ____, 64 L.Ed.2d 333, 342 n.5 (1980)), and lower courts have determined that such questions as whether a confession was involuntary (*Gunsby v. Wainwright*, 596 F.2d 654 (1979), *cert. denied* 100 S. Ct. 307 (1980)), or whether suppressed evidence is exculpatory (*Flemmi v. Gunter*, 410 F.Supp. 1361 (D. Mass. 1976)) are likewise not fact findings to which 2254(d) requires deference.

The same principle applies to a conclusion from primary historical facts of whether a given identification procedure is unduly suggestive and this Court has held as much in *Neil v. Biggers*, 409 U.S. 188 (1972). There in an opinion by Mr. Justice Powell this Court reversed the decision of two lower federal courts in an eyewitness identification case over the objection of the dissenters who claimed the majority's action contravened the two-court rule under which this Court traditionally defers to the factual findings of the lower courts. In response, Justice Powell wrote:

> "This rule of practice, under which the Court does not lightly overturn the concurrent findings of fact of two lower federal courts, is a salutary one to be followed where applicable. We think it inapplicable here where the dispute between the parties is not so much over facts as over the constitutional significance to be attached to them."

A reading of the Ninth Circuit's opinion in this case demonstrates that it was faithful to these principles. All the facts set forth in the opinion are drawn from the

record and do not contradict any finding of primary fact made by the California Court of Appeal. The number of photo spreads shown the witnesses, the actual period of time the witnesses had to view the assailants, the arrangement of photographs in the show ups—all these are primary facts about which the state Court of Appeal made no findings of fact. The conclusions of that court that the identifications were not "suggested" or that the identifications were not the result of "official pressure," or that the procedures were "fair" are precisely those ultimate conclusions of federal law which the federal courts were required to assess anew. If, as petitioner seems to suggest, the state court's conclusion that the procedures were inherently fair is to be deemed correct under 2254(d), the vindication of all federal constitutional rights will be left entirely in the hands of a state court. Because respondent believes no member of this Court is prepared to accept such a novel proposition he is confident the argument petitioner tenders here will be rejected.

II

BECAUSE THE UNNECESSARY FAILURE TO CONDUCT A LINE-UP WAS, ON THE FACTS OF THIS CASE, RELEVANT TO THE QUESTION WHETHER THE WITNESS' IDENTIFICATIONS WERE THE PRODUCT OF SUGGESTION AND WERE UNRELIABLE, THE COURT OF APPEALS PROPERLY CONSIDERED SUCH LACK OF NECESSITY.

Petitioner urges the Court to hold that the availability of the defendant for a physical line-up is never a factor to be considered in passing on the constitutional propriety of a photographic identification procedure. The Ninth Circuit's reliance on that factor in this case,

he argues, "resulted in an erroneous conclusion that the defendant was denied due process of law. . . ." (Brief for Petitioner, p. 31.)

In this section of his brief respondent shows that under this Court's totality of the circumstances test any factor which bears on the reliability of pretrial identification procedures may be considered by a court in passing on the propriety of those procedures. We also show that the use or non-use of a corporeal line-up can be relevant to a determination of suggestiveness and reliability, and that this is an example of such a case. The opinions of this and other courts recognize that identification procedures which would be questionable under ordinary circumstances may be acceptable in the face of exigent or unusual circumstances. In addition, if no reason whatever exists for officers to utilize the most reliable method available, an inference of manipulation may in some cases be justified. Conduct by the police amounting to manipulation of the identification process is and always has been relevant to the ultimate question of reliability. The Court of Appeal properly inquired into the necessity for the authorities to forego a line-up, and properly reversed the conviction.

A. The Totality of Circumstances Test as Applied in This Court and as Understood by the Ninth Circuit Permits Consideration of All Factors Relevant to Reliability.

Manson v. Brathwaite, 432 U.S. 98 (1977), which makes reliability "the linchpin in determining the admissibility of identification testimony" (432 U.S. at 112) holds that reliability is a function of any and all factors which may be relevant to that determination and that each case is to turn on its own facts.

In *Manson* this Court faced a choice between two approaches to the eyewitness identification problem. A reading of the opinion in *Manson* makes it apparent that the Court opted for the choice that was flexible and that would permit a court to consider the great variety of factors that present themselves in individual cases. The "*per se* rule," on the other hand, would have excluded all unnecessarily suggestive identifications without regard to whether they were otherwise reliable. This Court rejected the *per se* rule because "its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant." (432 U.S. at 112.) The "totality of the circumstances" test was described as an "ad hoc" one (432 U.S. at 110), which looked to the five factors enumerated in *Neil v. Biggers, supra*, and noted that these factors "included" those to be considered by a reviewing court (432 U.S. 114). Finally, the court noted that "[a]gainst these [*Neil v. Biggers* factors] is to be weighed the corrupting effect of the suggestive identification itself." (*Ibid.*)

Neil v. Biggers is likewise bottomed on a "weighing [of] all the factors" (409 U.S. at 201) relevant in a given case to the question of reliability. The five considerations listed by *Biggers* were not offered as exclusive ones as this Court made clear when it again noted that "the factors to be considered in evaluating the likelihood of misidentification *include*" the five enumerated factors. 409 U.S. at 199 (emphasis added).

This reading of the totality of the circumstances test is thoroughly understood in the Ninth Circuit. In *United States v. Field*, ____ F.2d ____, (No. 79-1533, 9th Cir. August, 1980), the Ninth Circuit noted this Court's injunction in *Simmons, supra*, 390 U.S. at 384,

that "each case must be considered on its own facts" and stated that Circuit had "followed this articulation of the due process standard [stated in *Simmons*] in numerous cases" including *Mata v. Sumner*, 611 F.2d 754 (9th Cir. 1979), *cert. granted* 65 L.Ed.2d 1139 (1980). *See also, e.g., United States v. Cook*, 608 F.2d 1175 (9th Cir. 1979), *cert. denied* 100 S. Ct. 706 (1980) ("each case must be considered on its own facts"). The *Field* court than made clear the considerations which govern its review of eyewitness identification questions as follows:

> "Our review of the District Court's admission of the in-court identifications . . . focuses exclusively on their reliability. Since '[i]t is the likelihood of misidentification which violates a defendant's right to due process.' [quoting from *Neil v. Biggers, supra*, 409 U.S. at 198] even 'a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability.' " [Quoting from *Manson v. Brathwaite, supra*, 432 U.S. at 110.]

Field then set out the five-factor approach of *Manson* and *Biggers* and stressed that the analysis mandated by those cases "includes" but is not limited to those five factors. Any factor, the Court noted, which may be of assistance to a reviewing tribunal and relevant to a given case should be considered in carrying out the *Manson* mandate. In *Green v. Loggins*, 614 F.2d 219, 222 (9th Cir. 1980), the Ninth Circuit made explicit that "the deterrence of [police] conduct is not the primary purpose behind judicial review of tainted eyewitness identification testimony. Rather a court reviews a

challenged in-court identification essentially to determine whether the witness' testimony retains sufficient indicia of reliability." 614 F.2d at 222.

B. Necessity Has Been Considered as Part of the Totality of the Circumstances in the Identification Cases of This and Other Courts.

At the outset it is crucial to understand what this Court did and did not hold on the question of necessity in *Manson v. Brathwaite*, and, more important, in *Neil v. Biggers*. In neither case did this Court hold that necessity may never be considered. Rather, *Biggers* rejected the notion that an unnecessarily suggestive identification by definition and "without more" violates due process. The question *Biggers* addressed was "whether . . . unnecessary suggestiveness *alone* requires the exclusion of evidence." 409 U.S. at 199 (emphasis added). And *Manson* actually appeared to recognize that there can exist factors which may "alleviate" an otherwise suggestive identification.[3] *Biggers* and *Manson* thus clearly do not hold that necessity or the lack of it may not be considered at all, but only that lack of necessity without more and unconnected to considerations of reliability is not a ground for invalidating an identification. Indeed, necessity has been a factor in several of the eyewitness identification decisions of this Court.

In *Simmons v. United States*, 390 U.S. 377, 384 (1968), in assessing the propriety of a photographic

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[3] "The *per se* rule, however, goes too far since its application automatically and preemptorily, *and without consideration of alleviating factors*, keeps evidence from the jury that is reliable and relevant." 432 U.S. at 112 (emphasis added).

identification against the standard there adopted and still in use, this Court stated that "[i]n the first place, it is not suggested that it was unnecessary for the FBI to resort to photographic identification in this instance." And in *Stovall v. Denno,* 388 U.S. 293, 302 (1967) the Court upheld a one-person show-up conducted in a hospital room because "the showing of [the defendant] to [the witness] in an immediate hospital confrontation was imperative."

In rejecting the *per se* rule as overly rigid and automatic, this Court in *Manson* looked to the opinion of Mr. Justice (then Judge) Stevens in *United States ex rel. Kirby v. Sturges,* 510 F.2d 397 (7th Cir.), *cert. denied* 421 U.S. 1016 (1975). *See Manson, supra,* 432 U.S. at 112. There the totality of the circumstances test was divided into three parts as follows:

> "Three different aspects of the 'totality of the circumstances' have been noted in cases testing the admissibility of pretrial identification evidence. The *suggestive* aspects of the procedures were emphasized in *Palmer v. Peyton,* 359 F.2d 199, 201 (4th Cir. 1966) and *Foster v. California,* 394 U.S. 440, 442-43; the *justification* for using a suggestive procedure was the apparent basis of decision in *Stovall v. Denno,* 388 U.S. 239, 302; and the *reliability* of the identification was critical in *Neil v. Biggers,* 409 U.S. 188, 199; and *Coleman v. Alabama,* 399 U.S. 1, 5-6." (510 F.2d at 402-03, emphasis in original, footnotes omitted.)

After noting that there was no justification for failure to conduct a corporeal line-up, the Seventh Circuit stated "But as the Court squarely held [in *Biggers*] these two defects without more, do not necessarily result in a deprivation of due process."

Necessity in one form or another is widely recognized as a factor to be considered as part of the totality of the circumstances. *See, e.g., United States v. Crawford*, 576 F.2d 794, 797-98 (9th Cir.), *cert. denied* 439 U.S. 851 (1978); *United States v. Peele*, 574 F.2d 489, 490 (9th Cir. 1978);[4] *Frank v. Blackburn*, 605 F.2d 910, 913 (5th Cir. 1979) (single person show-up may be made necessary and acceptable by exigent circumstances); *Israel v. Odom*, 521 F.2d 1370, 1373 (7th Cir. 1979) ("If . . . suggestiveness is found, the court must . . . consider whether any unusual or exigent circumstances existed which might, at least in part, have justified the use of the faulty procedures."); *United States v. Dailey*, 524 F.2d 911, 914 (8th Cir. 1975) (lack of necessity to show witness' photographs of defendant prior to trial); *Clemons v. United States*, 133 U.S. App. D.C. 27, 408 F.2d 1230, 1245-46 (D.C. Cir. 1968); *Government of Virgin Islands v. Petersen*, 553 F.2d 324, 327 (3rd Cir. 1977).

These cases make clear, then, that totality of the circumstances is a standard embracing exactly what it means—all circumstances affecting reliability—and that while necessity alone is not a valid basis for reversal it is a factor which can be considered, especially where—as here—necessity and reliability are bound up with one another.[5]

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[4] *See also United States v. Valdivia*, 492 F.2d 199 (9th Cir. 1973), *cert. denied* 416 U.S. 940 (1974); *United States v. Baxter*, 492 F.2d 150 (9th Cir. 1973); *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), *cert. denied* 429 U.S. 1099 (1977); *United States v. Calhoun*, 542 F.2d 1094 (9th Cir.), *cert. denied* 429 U.S. 1064 (1976).

[5] The Fifth Circuit in some of its cases has taken the view that "the fact that there may have been time for a line-up can play

[footnote continued]

While lack of necessity is clearly not *per se* a basis for reversal, and while the existence of necessity will not render "a blatantly suggestive and totally unreliable identification admissible" (*United States ex rel, Kirby v. Sturges, supra*, 510 F.2d at 403 n.15) the propriety of an inquiry into necessity is widely recognized. The reason is not difficult to discern. There is an undoubted law enforcement interest in identification evidence, both to free the innocent and to convict and apprehend the guilty. While there is clearly a line beyond which an identification becomes so suggestive that no amount of necessity will legitimize it, the fact is necessity or the lack of it has been a part of the equation in cases in this Court and the lower federal courts. Second, as we see in greater detail in Argument III, *infra*, the methods employed by law enforcement in conducting eyewitness identifications are relevant both to suggestiveness and reliability. A manipulated procedure can unduly suggest

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no part in whether the photographic spread was impermissibly suggestive." *United States v. Allison*, 616 F.2d 779, 783 (5th Cir. 1980). In that Circuit in assessing suggestibility it is "only the picture spread itself [that] must be evaluated ... – whether other more desirable methods of identification (*e.g.*, a line-up) were available or whether there was a compelling need for speedy identification are just not relevant to a determination of the impermissibly suggestive issue." *United States v. Sutherland*, 428 F.2d 1152, 1156 (5th Cir. 1970), *cert. denied* 409 U.S. 1078 (1972); *United States v. Ballard*, 423 F.2d 127 (5th Cir. 1970). But *see Frank v. Blackburn, supra*, 605 F.2d 910. And *see also United States v. Marchand*, 564 F.2d 983, 995 (2d Cir. 1977), *cert. denied* 434 U.S. 1015. This formulation, taken literally, may well go too far. It is of course true that if a reliable method of identification has been used it ought not to matter that a more reliable method could also have been used. But it does not follow that where the more reliable method is in fact the only reliable method, that a court cannot consider (a) the failure to employ the more reliable method and (b) the absence of necessity to by-pass that method.

an unreliable answer to the witness. Where the most reliable method of identification is deliberately by-passed by the police for no reason whatever, an inference of manipulation may be justified.

With these considerations in mind we now examine the relevance to reliability in this case of the unnecessary failure to hold a line-up.

C. On This Record, The Unnecessary Failure To Conduct A Line-up Was A Factor Related To Reliability.

It is generally recognized that a line-up is a more reliable method of identification than a photographic display. See Wall, *supra; Simmons v. United States, supra*, 390 U.S. at 383; *see* Grano, *Kirby, Biggers* and *Ashe: Do Any Constitutional Safeguards Remain Against Convicting The Innocent?* 72 Mich. L. Rev. 717, 769 (1974); Libling, *The Use of Photographs for the Purpose of Identification*, 1978 Crim. L. Rev. 343, 345; Williams and Hammelman, *Identification Parades*, 1963 Crim. L. Rev. 479 484; Comment, *Photographic Identification: The Hidden Persauder*, 56 Iowa L. Rev. 408 (1970); Comment, 1972 Utah L. Rev. 100, 104.

In this case that assessment is borne out by the statements of the witnesses themselves. In the first place both witnesses complained repeatedly about the quality of the photographs.

The inadequacy of the photo spread was explained to the officers again and again. Both Allen and Almengor complained of the age of the photos (J.A. 97-8, 79; RT 715-16, 595-96), of the changed appearance that might have taken place because of the age of the photos, of the fact that they could not tell the height and body

build of the assailants from the photos, of the fact that the photographs altered the complexion of the assailants, of the fact that the photos were in black and white rather than color (J.A. 62; RT 424-25).[6] In light of these limitations and even after having seen the last photo spread (Exh. 24), Almengor insisted on seeing a corporeal line-up (*see* RT 716, 721).

Second, Almengor testified repeatedly that *he needed a physical line-up in order to make a positive identification.* The transcript of this trial is replete with references by Almengor that he could not make a positive identification from photographs and that he needed to see a line-up. He stated:

> "I never made a positive identification [from the photographs]. I told [the officers] that until I see the men, I will [not] be able to give a full, positive identification." (J.A. 63-4; RT 437:9-11.)

And again

> "Q. Okay and you said that you couldn't be positive unless you saw them [the defendants] in a line-up. Right?
>
> "A. Yes, sir." (RT 437:18-20.)

And again

> "I never made a positive identification. I told Lt. King 'when I see the men before me present at the preliminary, I'll be able to give you a full identification, unless you want to show me a line-up.' " (J.A. 67; RT 457:11-14.)

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[6] As to the relatively greater reliability achieved through use of color photographs rather than black and white ones, *see* Sussman, Sugarman, & Zavala, *A Comparison of Three Media Used in Identification in Personal Appearance Identification* XI-7 A. (Zavala Ed.) (1970) discussed in Grano, *supra*, 72 Mich. L. Rev. at 768-69.

And again

"Q. Did you tell them [the officers] you weren't making any positive identification and you wanted to see the person in person?

"A. Yes, sir.

"Q. You wanted to see a line-up?

"A. Yes, sir.

"Q. And was anything said to you about providing a line-up to you?

"A. Yes, sir. They were going to provide a line-up, and then something came about, and they did't ever—it never came. I just didn't say nothing about it no more." (J.A. 71; RT 496-97.)

And again

"Q. Am I correct that you asked the prison officials if you could see these people in person?

"A. Yes, I wanted to see them in person.

"Q. Were you ever given the opportunity to see them in a line-up?

"A. No, sir." (RT 425:9-14.)

This testimony was confirmed by the investigating officer (RT 932:12-14) and by a tape of an interview Almengor gave correctional authorities during the investigation. (RT 783.)

Third, this record contains proof of the importance of a line-up to a reliable identification. After having tentatively identified Vargas from Exhibit 24 on October 30, 1972,[7] Allen and Almengor left the room and

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[7] It is worth noting in the case of Almengor that Vargas was identified on October 30 only because he had been identified in

[footnote continued]

were being escorted back to their cells when they saw Vargas in the shower. At that point, the witnesses with Vargas before them knew immediately that their photographic identification had been erroneous and they so informed the correctional authorities. (J.A. 72; RT 500-02.)

The witnesses' combined insistence that the photographs they were presented with were inadequate, their statements that they needed to see the defendants in a line-up in order to make a reliable identification, and their recanting of their identification of Vargas upon seeing him before them were all facts affecting the reliability of the photographic spread itself. It is absurd to suggest—and this Court has never suggested—that under these circumstances the failure to conduct a line-up could not be considered as part of the suggestiveness-reliability equation. And once it is conceded that failure to conduct a line-up is a factor tied to reliability, necessity must also be considered. For, as already noted, exigent circumstances and police manipulation can both be relevant to the propriety of identification procedures.

This record makes it perfectly obvious that there was no reason whatever not to give the witness the line-up he told the officers he needed to make a reliable pretrial identification.

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previous photographs (RT 463). Thus however old were the photographs and however different were the appearances of the defendants between the time their pictures were taken in Exhibits 23 and the time they were taken in Exhibit 24, their appearances were not sufficiently different to prevent Almengor from identifying Vargas.

The dissenting opinion below and petitioner both base their argument that necessity existed in this case on the conditions which existed in Tehachapi immediately following the incident, and on the need to maintain the anonymity of potential eyewitnesses. Whatever their general merit, these contentions are belied by the record in this case.

In the first place, prison riot conditions to the contrary notwithstanding, in creating the photographs for Exhibit 24 officials at Tehachapi risked no greater disruption than if they had actually conducted a line-up. For in order to compile the photographs for Exhibit 24 the officials first brought some 15 inmates from their cells and had each photographed. They then took the three defendants out again and had them each separately photographed. (RT 716-18.) It is difficult to understand why, having gone this far, the officers were unwilling to place the same or a series of smaller groups in physical line-ups.

Second, anonymity of the witnesses could have been assured by any number of simple devices such as a sheet or a piece of plywood with a hole in it, or by a properly placed mirror. Moreover, here we have three witnesses who were removed to segregation precisely because they were already *known* to the remaining inmate population as potential informants.

This is not a case where the photo spreads were all shown immediately after the crime or where there was a pressing need to move quickly to aprehend the suspect. *See, e.g., Stovall v. Denno, supra; Mock v. Rose*, 472 F.2d 619, 621 (6th Cir. 1972), *cert. denied* 411 U.S. 971 (1973). Here photographs were continuously shown to the witness over a period of 11 days

from the killing of Arias and while all potential suspects were incarcerated and could not flee. Moreover, from October 20th on when Childress came to the officers, three suspects were apprehended and known to the police. Nor is this a case in which the witness could not participate in a line-up (*see Stovall*), or where there were no suspects comparable in appearance to the defendants to place in the line-up (*cf. Smith v. Coiner*, 473 F.2d 877, 881 (4th Cir. 1973), *cert. denied* 414 U.S. 1115 (1974).

Whatever the realities of prison life and whatever the flexibility that must be accorded prison officials in maintaining order and discipline in prison, the state can have no interest in the use of procedures which lead to the conviction of innocent people, whether they are inmates or not. Indeed, the hostilities, tensions, and potential for retaliation that can be created when the wrong man is convicted in prison argue strongly that prison order is actually undermined by the use of procedures which create a likelihood an innocent person will be convicted.

III

THE COURT OF APPEALS PROPERLY CONSIDERED POLICE CONDUCT TENDING TO FOCUS THE WITNESS' ATTENTION ON A PARTICULAR SUBJECT.

Respondent also contends that it was improper for the Court below to consider either "conduct on the part of the police tending to focus attention of [sic] a particular subject" or "presence or absence of other witnesses at the time of the improper identification and the possible prejudicial influence of one witness' opinion on another's recollection." (Brief of Petitioner at p.

46, quoting from *Parker v. Swenson*, 332 F.Supp. 1225, 1230-31 (E.D. Mo. 1971), *cert. denied* 409 U.S. 1126 (1973).) The presence of other witnesses was in actuality not considered by the Court below, although because this Court considered precisely this factor in *Manson v. Brathwaite, supra*, 432 U.S. at 116,[8] there is nothing improper about doing so in the right case.

Petitioner's position with regard to both factors results again from his overly rigid interpretation of this Court's opinions in *Manson* and *Biggers*. As we have already seen, the five-factor test of those cases is a flexible one which permits a court to consider any matter relevant to the question of reliability. Against the five factors must be weighed "the corrupting effect of the suggestive identification itself." (432 U.S. at 114.) Obviously relevant to whether the effect is, in fact, "corrupting" is the conduct of the police in focusing a witness' attention on the accused. No one would seriously contend, for example, that a court should be powerless to consider the fact that while presenting the witness with a photographic display that is fair on its face, a police officer was pointing to the picture of the accused and telling the witness that the accused is in fact the culprit. While a court may not examine police conduct for the purpose of deterring it, it is required to do so in order to decide whether the conduct impermissibly suggested an identification to the witness and hence undermined the reliability of the witness' identification.

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[8] ". . . [S]ince Glover examined the photograph alone, there was no coercive pressure to make an identification arising from the presence of another."

This Court's eyewitness identification cases recognize the relevance of police conduct and are filled with concern for procedures used by the police. In *United States v. Wade*, 388 U.S. 218, 228 (1967) the Court stated that "a major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." In *Coleman v. Alabama*, 399 U.S. 1, 6 (1970) the court rejected an eyewitness identification contention noting that "the record is utterly devoid of evidence that anything the police said or did prompted [the witness'] virtually spontaneous identification of petitioners. . . ." And in *Simmons v. United States, supra*, 390 U.S. 377, 385 the court noted: "Each witness was alone when he or she saw the photographs. There is no evidence to indicate that the witnesses were told anything about the progress of the investigation or that the FBI agents in any other way suggested which persons in the pictures were under suspicion."

Lower federal courts have likewise looked to actions by the police in presenting a photographic display as part of the manner in which the prosecution presents the suspect to the witness for pretrial identification. Thus the Fifth Circuit in *Frank v. Blackburn, supra*, 605 F.2d 910, 913 upheld a conviction in part because "there were no words or actions by police aggravating the suggestiveness of the confrontation." *Accord United States v. Sanchez*, 603 F.2d 381 (2d Cir. 1979) (question is whether police practices corrupted the identification); *United States v. Mears*, 614 F.2d 1175, 1177 (8th Cir. 1980) ("a display is not impermissibly

suggestive where the agent does not direct the witness' attention to any particular photo"); *United States v. Dailey, supra.*

It is also widely recognized among psychologists that "the expectations or hypotheses of an authority can influence the behavior of others" and that police practices in conducting pretrial identification procedures afford a classic opportunity to transmit those influences to a witness. *See* Yarmey, *The Psychology of Eyewitness Testimony*, 154 (1979).

The Ninth Circuit has spoken most cogently to this contention in *United States v. Field, supra.* There the court analyzed the so-called *Parker* factors along with the test set forth in *Manson* and *Neil* and concluded there simply was no conflict between them. This analysis, we submit, is correct and was correctly applied here. It recognizes that suggestiveness is a treshhold consideration and that reliability is the central concern. It also acknowledges that any factor relevant to suggestiveness or reliability is useful to a court in discharging its *Biggers-Manson* mandate. An examination limited solely to the photo display itself without conduct associated with the display, such as gestures or words by the police pointing to a given suspect or conversations among the witnesses which "persuade" some of them that a given suspect is the culprit, overlooks clearly relevant matters. The underlying question, after all is, whether the person being identified is being chosen on the basis of the witness' recollection of past events or because the identification was planted in the witness' mind by someone else.

Again, because it contains extensive evidence of suggestive police practices, the present record illustrates the point.

Both the District Court and the Court of Appeals recognized, in the words of the District Court, "that irregularities occurred in the pretrial photographic identification." (Appendix to Petition for Certiorari, D-3. *See also* A-6 through A-11.) These conclusions are amply supported by the record. The suggestiveness of the identification procedures used in this case is a function of several factors which tended to point the witnesses away from a selection of the choices which they would have made on their own and toward a desired result.

First, as already pointed out, notwithstanding the witnesses' insistence that the photographs being presented to them were for one reason or another inadequate and unreliable, and notwithstanding Almengor's repeated statements that he could not make a proper identification without a line-up, no such line-up was held. Since there was no reason for failure to hold the line-up, we can only conclude the action in failing to assemble one was deliberate. Once it became apparent to the investigating authorities that the chance physical display of Vargas to Allen and Almengor had changed the witnesses' minds and that they had retracted their identification of Vargas, the failure to conduct a line-up became, frankly, unforgiveable. Failure to hold a line-up constituted one sign among many that the authorities were interested in obtaining the identification they preferred rather than in the one the witnesses were prepared to give them.

Second, the officers informed Almengor that all of his initial choices had been "wrong." Following a careful and deliberate review of many pictures on October 19 (RT 779) Almengor selected four individuals as the culprits: "Bogus Pete" Nunez, Vargas and two other inmates named Ramirez and Reymundo (RT 399-400, 766, 914-15). The identification of Nunez had several important indicia of reliability. Almengor's identification of his was "positive" (RT 711). Nunez was chosen after Almengor had overheard talk among people in the dormitory that Nunez had actually committed the crime. Following these conversations Almengor in point of fact selected Nunez's photograph even though the names on all the photographs were not visible and even though Nunez's appearance on October 19 was different from the way he appeared in the photographs.[9] Even though Almengor's independent

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[9]Nunez apparently had longer hair on October 19 than in the photograph and he did not have a moustache in the photograph but did on October 19. (RT 712.) In this respect his situation was exactly the same as Mata's.

A study of the record reveals a strong likelihood that the identification of "Bogus Pete" Nunez was, in fact, reliable. Although, Officer King told Almengor that Nunez was on outside work crew on the afternoon of October 19, 1972, there is actually a strong indication that Nunez was still on the prison grounds at the time Arias was killed.

Prosecution witness Officer Thompson, who was head of the outside work crews at Tehachapi on October 19, 1972, testified that there was a standing order for his work crews to leave the prison gates by 1:00 p.m., daily (RT 772). Despite the standing order, however, occasionally the crews left later than 1:00. (RT 774.) Thompson never checked his crew book, on October 19 or any other date, to determine who was on his crew, and what time the crew actually left prison grounds. (RT 775.) The crew book in which were kept official records of all people going out

[footnote continued]

identification of Nunez corresponded with an apparent consensus among other inmates and was made notwithstanding important differences between Nunez's appearance on October 19 and his appearance in the photographs, the police rejected the identification and *told Almengor they were rejecting it.* Officer King testified:

> "I told Mr. Almengor that Bogus Pete Nunez could not have been involved in the incidents since we knew that he was outside the security area on a work detail at the time of the incident." (J. A. 95-6; RT 713.)

In *United States v. Field, supra,* a witness to a bank robbery was shown a photographic spread. According to the court "[w]hen shown the photo spread and asked to identify the man he had seen in the bank, Kotzen [the witness] selected a photograph other than Field's [the defendant's] photograph. The agent told Kotzen that his selection was wrong and Kotzen then selected Field's photograph." The court included this conduct among its reasons for holding "that the pretrial focusing on Field outweighs any indicia of reliability detected in Kotzen's identification." *United States v. Field, supra.* Obviously, if investigating authorities are aiming for an identification which is derived wholly from the witness and is not the product of their own suggestion, they will not inform the witness that he has made a "wrong

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with Officer Thompson, and the times of departures and returns, was lost. (RT 774.) No verification from prison records can be made as to whether Nunez was actually on the work crew of October 19, 1972, and/or what time the crew left the grounds.

Furthermore, the testimony of Carlos Ortega places Nunez in the dormitory at or near the time of the killing (RT 832), and in testifying about the killing in another proceeding in April, 1973, Ortega implicated Nunez. (RT 872.)

choice." In fact, in such a situation there would be no concept of a wrong choice.

Third, the officers removed all selections they regarded as "mistaken" from all subsequent displays. After Almengor "misidentified" Nunez, Reymundo, and Ramirez, and identified Vargas on October 19, the officers removed the photographs of Nunez, Reymundo, and Ramirez from all future displays and none of the three ever appeared again (RT 925) (Exhibits 23, 24).

This conduct is especially difficult to understand because while there was an assertion that Nunez could not have participated in the killing because he was outside the grounds (but *see* discussion *supra*) there is no explanation for why the officers no longer regarded Reymundo and Ramirez as suspects. That the investigating officers were not interested solely in removing tentative or uncertain identifications is demonstrated further by the fact that Vargas' photograph was not removed notwithstanding the equally tentative and uncertain nature of Almengor's identification of him. The only reason Vargas' photograph would have been retained and the others eliminated is that the investigating officers had a belief in Vargas as a suspect which they sought to transmit to or have confirmed by Almengor.

Fourth, while removing wrong identifications the officers continued to show the photographs of the defendants in all three photo spreads. The continued and recurrent use of a defendant in a series of corporeal or photographic displays has been condemned by this Court in *Foster v. California*, 394 U.S. 440, 443 (1969) and in *Simmons v. United States, supra*, 390 U.S. at 384 where the Court noted that the danger of improper

suggestion "will be increased if the police show [the witness] the pictures of several persons among which the photograph of a single . . . individual recurs." The effect of previous exposure to a photograph on a subsequent corporeal identification has also been noted in the literature. *See, e.g.*, Loftus, *Eyewitness Testimony*, 150-52 (1979) (photo-biased line-ups). In such a situation the subtle but real cumulative effect of suggestion is apparent.

The photographs of Mata, Vargas, and Gallegos recurred in all displays while other supposed misidentifications were removed. While the appearances of the defendants had changed by October 19, Almengor was still able to identify Vargas from old photographs and was prepared to make an identification of Nunez notwithstanding that he like Mata had grown hair and a mustache after the taking of the original photographs. In addition, between October 19 and October 30 all defendants were in segregation with the witnesses and could be seen on a daily basis taking exercises. It is no wonder therefore that by the time Almengor had seen Mata's photograph for the third time on October 30 this identification became "certain."

Fifth, the record strongly suggests that the witnesses were permitted to view the three defendants and only three defendants before they were rephotographed on October 27. The evidence revealed that after Almengor expressed difficulty making an identification from photographs, the authorities undertook an elaborate plan to present a series of new photographs to the witnesses. To accomplish this they brought approximately 15 inmates to be photographed but the inmate photographer taking the pictures in some way erred and the

photos did not come out. The authorities then brought Mata, Gallegos, and Vargas, and only these three, back to be photographed again on October 27.

While Almengor and Allen professed at trial not to recall seeing the three being taken out to be photographed the record as a whole strongly suggests otherwise. At the preliminary hearing Almengor specifically stated that he saw all three being taken out together on October 27 and prior to trial (*See* RT 445-46). Allen told James Faulkner, a licensed defense investigator appointed by the court, that "at the time these defendants were taken out to be photographed they were the only ones taken out of segregation to be photographed. And, apparently, there was [sic] some recent photographs taken. So he [Allen] assumed that since they were the only ones in segregation that they were on the chart, the photographic chart he was shown at a later time—that they must be the ones that did it." (J.A. 177; RT 1119.)

These exposures of the defendants to the witnesses prior to the photographic displays were highly suggestive. Permitting the defendant to be seen prior to the witness' attempt to identify him under conditions which suggest he is a suspect is a technique which has been widely condemned both by this Court (*United States v. Wade, supra*, 388 U.S. at 234), the lower courts (*United States v. Field, supra; Green v. Loggins, supra*, 614 F.2d at 223), and the commentators, (*see* Wall, *supra*, at 48; Napley, *Problems of Effecting the Presentation of the Case for a Defendant*, 66 Col. L. Rev. 94, 99 (1966).) The suggestive power of such an exposure is obvious and leaves the witness with the precise conclusions Allen claimed he was led to in this case.

For all these reasons the identification procedures were suggestive and the Court of Appeals was justified in considering them.

IV

THE COURT OF APPEALS CORRECTLY DECIDED THAT THE IDENTIFICATION IN THIS CASE WAS UNRELIABLE.

Having shown that the Court of Appeals considered proper factors in passing on the questions of suggestibility and reliability and that the identification procedures were suggestive, we now examine this record to determine whether, notwithstanding the suggestiveness, the identifications were unreliable and gave rise to a substantial likelihood of irreparable misidentification.

A few preliminary considerations are important. First, as we have seen, while some physical evidence was recovered, there was virtually none which linked the defendants with the crime. The case therefore depended on the eyewitnesses. Second, these witnesses were extraordinarily unsympathetic and unreliable.

Almengor himself was a suspect in the case because he attempted to hide blood soaked clothing and did not approach the police until confronted with the clothes. He was also near-sighted and was not wearing his glasses on the day of the attack, was an inveterate glue sniffer, and testified under promises of leniency. Allen was likewise testifying under promises that he would be considered for an earlier parole, he was a member of the Nuestra Familia, had failed to make any identifications until October 30 and was, as Judge Sneed recognized in his dissent below, a rank opportunist. Thus, for example, while he and Almengor both knew

they had misidentified Vargas. Allen said nothing to the authorities about it. When asked if he had spoken up he answered "no, I just kept it to myself . . . I mean what good would it do me to tell anybody?" (J.A. 82-3; RT 623.)

In addition these identifications bear several important signs of unreliability.

First, the initial identifications—a strong indication of reliability—were in both cases suspect. Allen first claimed he could see nothing, that the attack had happened so fast he was unable to view the incident, and that he could make no identification whatever. He confirmed this in his statements at the preliminary examination, at trial, and in his statements to Investigator Faulkner. He told Faulkner, for example, that he could not recall if the assailants had mustaches, if they were Mexican or Caucasian, or what they were wearing. (RT 633.) Almengor on the other hand made three "wrong" choices in his first attempted identification, failed to make any identification of Mata in the second photo display, and finally chose Mata only on the third time. As soon as both witnesses were exposed to a physical view of one of the defendants, they retracted the identification and continued to maintain they had misidentified Vargas.

An important part of the Court's determination in *Biggers* that the identification had been reliable was the fact that "the victim made no previous identification at any show-ups, line-ups, or photographic showings. Here record for reliability was thus a good one, as she had previously resisted whatever suggestiveness adheres in a show-up." 409 U.S. at 201. The accuracy and specificity of the initial identification has long been

recognized as an important part of the reliability analysis mandated by *Biggers* and *Manson*. Thus, Wall, *supra*, lists as one of the "danger signals" which "should give warning that the identification may be erroneous" the following two: (1) "The Witness Originally State That He Would Be Unable to Identify Anyone" and (2) Before Identifying the Defendant at the Trial, the Witness Erroneously Identified Some Other Person." (Pp. 90, 101.) Each danger signal is present in this case. Allen stated he would be unable to identify anyone and Almengor "misidentified" three individuals at the initial identification. Thus in contrast to the witness in *Biggers*, the "record for reliability" of these witnesses was extremely poor.

Second, neither witness enjoyed a good opportunity to view the defendants. Allen was distracted altogether. According to Allen's testimony he was "glancing up" while buttoning his denim jacket when the attack on Arias broke out. (J.A. 80, 75; RT 612, 586.) Once the fight started, Allen's main purpose was "trying to keep from getting killed." Allen testified that "well, the other two [referring to Mata and Gallegos] I couldn't see that good" (J.A. 76; RT 587). The third man (Vargas) leaped at Allen and jabbed his knife toward him, cutting Allen's sleeve and scratching the skin on his forearm. (J.A. 78; RT 588.) Allen stepped back a few steps and started yelling for help. (RT 589.) As he did so, he noticed Almengor fighting "with someone" but he did not know with whom. (RT 589.) Allen did not even know where Almengor was when the correctional officer arrived at the scene as the fight broke up. (RT 590.) Allen testified that his attention during the fight was drawn to the man with the big knife.

"A. I was looking at the man with the big knife.

"Q. You got a good look at him?

"A. Yeah, I seen him.

"Q. And he pretty well occupied your attention from then on didn't he?

"A. That's right.

"Q. And were you looking at the knife or did you get a good look at his face?

"A. No, I was looking at the knife." (J.A. 80; RT 614.)

Allen testified further that he essentially never took his eyes off the man with the big knife. (J.A. 81; RT 617.) And even as to this man, Allen's identification was so uncertain that he subsequently retracted it and maintained through the trial that Vargas was in fact innocent.

Almengor's opportunity to view was not considerably better. Almengor testified that before the attack, he had been anticipating trouble. (RT 413.) Almengor was walking with the victim, Arias, toward a bulletin board just outside the dormitory. Almengor testified that Arias was talking to him as they were walking. (RT 390.) Although Almengor noticed three inmates standing by the bulltein board, he "didn't pay them no attention. . . . Well, I wasn't really noticing if there was anybody else around. My attention was if I seen any Mexican guys inside the dorm because that's the real danger I had my eyes on." (J.A. 61; RT 415.) The three inmates, according to Almengor, were looking at the bulletin board, with their faces turned toward the board and away from Almengor. (RT 415.) Although

Almengor is nearsighted, he was not wearing his glasses. The inmates who were standing by the bulletin board, turned around "real fast" (J.A. 37; RT 376). Almengor took a few steps away from the victim (J.A. 38; RT 377). As the attack on Arias started, the only inmate Almengor was looking at was the "third man," the "tall one," thought to be Vargas. Almengor testified to staring at this third man as the man pulled a knife out of Arias' back. (RT 418.) Almengor stated that the third man was the person he remembered most clearly from the fight. (RT 420.) As the fight broke out, Almengor looked over at Allen, and saw the third man "slooped and pulled away . . ." (RT 379-80) from Arias, saw stabbing motions being made quickly at Arias, and heard Allen screaming for people to come and help. (RT 383.) At this same moment, Almengor testified, respondent appeared to "rush me with a knife" (J.A. 42; RT 380). Almengor defended himself by blocking the blow and throwing a kick which pushed respondent quickly to the door at the other end of the corridor, at least six feet away. (RT 380.) Respondent then turned and ran out. As he was running away, his back was toward Almengor.

Although Almengor had face-to-face contact with respondent, it was for only a very few seconds, and was during a highly charged, fast-moving fight, which by Almengor's own testimony, lasted but a few moments. Almengor stated that the "third man," on whom he was concentrating, and whom he saw stab Arias, was the one inmate he had the best opportunity to view. (RT 420.) With the exception of the brief moment of eye contact which occurred in the midst of great commotion, Almengor was never paying attention to respondent.

Both of these observations were made under conditions of extreme stress, conditions which have been shown to cause poor performance in simulated eyewitness identifications. Loftus, *supra, Eyewitness Identification*, at 153-56 and *see* Uelman, *Testing the Assumptions of Neil v. Biggers: An Experiment in Eyewitness Identification, supra*, 8 Crim. L. Bull, 358 (1980).[10]

Third, the prior descriptions by both witnesses were not only mistaken but very vague.

Almengor's prior description of respondent is devoid of any significant detail. When Almengor described respondent as wearing denim blues and a prison issue hat (RT 376) he could have been talking about the entire population of Tehachapi. This part of his description is therefore meaningless. Almengor also noted only that respondent had a thin moustache and wore black leather gloves. But even this description was inaccurate since Exhibit 24 reveals that respondent's moustache on October 19 was in fact full and bushy.

Allen's description of Mata was, like Almengor's quite vague: state clothes, moustache, state-issued beanie, and gloves. (RT 621-22.) In addition, Allen had stated at one point that he did not get enough of a look at the attackers during the fight to make any reliable identifications. (RT 630.) Despite the fact that Allen had known respondent personally, before the stabbing incident (RT 595), he had neither been able to name him nor to give a detailed description of him. (RT 595.) Allen told a defense investigator that he

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[10]In this article the author, a law school professor, tested the abilities of law students accurately to identify a man and a woman involved in a simulated, unannounced fracas in his class. The rate of erroneous identifications was in excess of 70%.

made a positive identification of respondent only after the prison officials reminded him he was coming up for parole. (RT 634.35.)

Fourth, neither witness demonstrated a high level of certainty at the time of the final identifications. As we have seen, Allen had earlier indicated that he could not make any identifications and Almengor's previous identifications had all been wrong. In addition, despite the fact that they were prepared to make an identification of Vargas on the 30th of October, when they saw Vargas in person immediately after having made the identification they retracted it.

Eleven full days passed between the time of the incident and the time of the final identification. Much has been written on the effect of the passage of time on the retention of information in memory. *See, e.g.*, Loftus, *supra, Eyewitness Testimony*, 65 and studies there cited; Yarmey, *supra, The Psychology of Eyewitness Testimony*, ch. 4. Among many studies noted bt Loftus, *supra*, is one in which she and others demonstrated that by the time two days had passed between the incident and the identification, subjects asked to retain significant details of a previously presented event were performing at about a 50% rate, a figure which, the study concluded, "means that the subjects are simply guessing." Loftus at 65. These performances were noted over intervals of time during which no additional information was introduced to the subjects. That of course was not the case here. Almengor was told that he had previously made wrong choices and those wrong choices were removed. He was also shown a series of photographs containing the pictures of the defendants over and over again.

So unreliable were the identifications that the prosecutor was forced to acknowledge in his opening statement that the witnesses had "had difficuty identifying the assailants." (J.A. 6; RT 223.) In Wall's classic account, *Eyewitness Identification in Criminal Cases*, there are listed twelve "Danger Signals" which "should give warning that the identification may be erroneous." Eight of them apply to this case.

Here one witness originally stated that he would be unable to identify anyone and another erroneously identified other inmates. Although Allen knew the defendant prior to the crime he made no accusations against him when questioned by the police. Discrepancies existed between the witness' original description of the perpetrator of the crime and the actual description of the defendant. Almengor had erroneously identified three other inmates, one of them "positively," before naming Mata. The witnesses had a limited opportunity to see the defendant. A period of eleven days elapsed in the identification. The crime was committed by a number of people.[11]

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[11]The complete list is as follows:

"The Witness and the Person Identified Are of Different Racial Groups; During his Original Observation of the Perpetrator of the Crime, the Witness Was Unaware That a Crime Situation Was Involved; A Considerable Period of Time Elapsed Between the Witness's View of the Criminal and His Identification of the Defendant; The Crime Was Committed by a Number of Persons; The Witness Fails to Make a Positive Trial Identification; The Witness Originally Stated That He Would Be Unable to Identify Anyone; The Identifying Witness Knew the Defendant Prior to the Crime, But Made No Accusation Against Him When Questioned By the Police; A Serious Discrepency Exists

[footnote continued]

The conclusions drawn by the Court of Appeals from this record are all amply supported and its judgment, therefore, must be affirmed.[12]

Between the Identifying Witness's Original Description of the Perpetrator of the Crime and the Actual Description of the Defendant; Before Identifying the Defendant at the Trial, the Witness Erroneously Identified Some Other Person; Other Witnesses to the Crime Fail to Identify the Defendant; Prior to Trial the Witness Sees the Defendant But Fails to Identify Him; Before the Crime Was Committed, the Witness Had a Very Limited Opportunity to See the Defendant."

[12]Petitioner makes no argument here that any error that may have been committed was harmless beyond a reasonable doubt. Clerely it was not. The case was based solely on eyewitness testimony. Of the three eyewitnesses who testified, only Childress' testimony was untainted, and even his testimony was weak. As developed more fully in the statement of the case, *supra*, while Childress claimed to have had a clear view of the incident, he stated that only the three defendants were present. Yet Allen and Almengor placed themselves at the scene as well. In addition, his bunk-mate testified Childress was actually playing cards with him at time of the killing and could not have seen the stabbing. While respondent has not challenged Childress' identifications, they were less than solid. First his account of the identification procedures and Officer Mills' differ in important respects. (*Compare, e.g.*, RT 285-86 with RT 688.) Second, at least according to the investigating authorities, Childress' own identification was made from single, isolated pictures of Mata and Gallegos. (RT 688.) He described Gallegos as with a moustache—which was apparently untrue. (*See* Exhibit 24.) Moreover, even if Childress' testimony was wholly reliable, the jury was confronted with a case in which two of three eyewitnesses had made constitutionally suspect identifications. The Court of Appeals was correct in concluding that error committed under such circumstances cannot be harmless.

CONCLUSION

Those involved in the trial of criminal cases have long known that faulty eyewitness identifications are responsible for the conviction of many innocent people. *See, e.g.*, Borchard, *Convicting the Innocent* (1933; repr. 1961); Frankfurter, *The Case of Sacco and Vanzetti* (1927; repr. 1962). Recent studies confirm both the inherent unreliability of eyewitness identifications and the prejudicial impact such identifications tend to have upon juries. *See, e.g.*, Loftus, *supra*; Uelman, *supra.* Daily stories such as those of a priest who was wrongly accused of robbery on the basis of no fewer than seven "eye-witnesses" illustrate the persistence of the problem. (*See* Buckhout, The Mistaken Seven: *Eyewitness Identification of the "Gentleman Bandit,"* 7 Crim. Defense 5 (1980).) Against this background the Court of Appeal conducted a careful review of this record, and arrived at the only plausible conclusion:

In the chaos and confusion at Tehachapi on October 19, 1972, the need to isolate *some* culprits unfortunately overwhelmed the duty to isolate the *right* ones. The Court of Appeals acted responsibly in the face of this fact. In so doing, the Court of Appeals remained faithful to the teachings of this Court and its judgment must, therefore, be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
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No. 79-1601

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

GEORGE SUMNER, WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,
Petitioner,

vs.

ROBERT MATA,
Respondent.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I

PROCEDURAL ARGUMENTS HAVE BEEN PRESERVED FOR THIS COURT'S REVIEW AND EITHER PROCEDURAL DEFAULT BARS FEDERAL REVIEW OR THE STATE COURT FACTFINDINGS MUST BE PRESUMED CORRECT.

A. Procedural Default.

1. Failure To Object To Identification Testimony, The Effect Of Direct State Appellate Review, And The Appropriate Federal Standards Of Review Were Argued Below And Are Preserved For Review.

Defendant's "confusion" with our procedural argument is largely a function of the failure to grasp the distinction between two conceptually different doctrines: exhaustion of state remedies as a prerequisite to federal review, and procedural default as an independent state ground barring federal review. See Wainwright v. Sykes, 433 U.S. 72, 78 (1977); Fay v. Noia, 372 U.S. 391, 399 (1963); Developments in the law - Federal Habeas Corpus, 83 Harv.L. Rev. 1038 (1970). He has consistently attributed our argument to the former

doctrine, when in fact we rely on the latter. We have stated that defendant has exhausted state remedies, i.e., no state relief is available. However, this exhaustion does not cure his failure to object to identification evidence at trial which provides an independent state ground barring federal review.

Moreover, the procedural default argument was "pressed or passed upon below." Duignan v. United States, 274 U.S. 195, 200 (1927). At the April 6, 1978, hearing on the Return, we stated defendant's failure to object to identification evidence resulted in procedural default. We informed the district court that California's appellate court addressed the merits of this claim on direct review, and under the controlling case of Curry v. Wilson, 405 F.2d 110 (9th Cir. 1969), the state thereby forfeited the right to claim procedural default. The district court ruled that

Wainwright v. Sykes, 433 U.S. 72 (1977), was inapplicable because of California's direct review. (Petition for Writ of Certiorari, D-2, D-3.)

In our view, Curry review necessitates that state court findings be presumed correct. Our argument that the state court's findings satisfied section 2254(d), went unchallenged and undisputed by defendant throughout proceedings below.

To the district court we argued:

> "Petitioner complains that the eyewitness identification of him by two of the three eyewitnesses to the murder, inmates Jay Allen and Rigoberto Almengor, was admitted in violation of his right to due process of law. This identical issue was raised on appeal from petitioner's conviction. The Court of Appeal, a court of competent jurisdiction,

determined in a written opinion in a full and fair hearing that the pretrial identification procedure was not impermissibly suggestive. Accordingly, this determination is presumed correct. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief herein unless, upon a review of the pertinent record as a whole, this Court finds that the state court determination that the identification evidence was properly admitted, was clearly erroneous. 28 U.S.C. § 2254(d). Petitioner bears the burden of establishing by convincing evidence, that the state court determination was clearly erroneous. 28 U.S.C. § 2254(d)."

(J.A., pp. 194-195.)

We asked the Court of Appeals to uphold

the district court's factual findings unless clearly erroneous:

> "It is axiomatic that the District Court's factual finding in this habeas corpus proceeding should not be set aside unless it is clearly erroneous. Rule 52(a), 81(a)(2) of Fed. Rules of Civ. Proc; Albrecht v. Nelson, 462 F.2d 623, 624 (9th Cir. 1972); Alesi v. Craven, 446 F.2d 742 (9th Cir. 1971)." (Appellee's Brief, Filed November 13, 1978, p.10.)

This building block of appellate review necessarily rests on the assertion that the state court's findings must be presumed correct and, of course, we designated the record to the Court of Appeal to include our Return. (See Record on Appeal, Northern District of California, p.103, District Court Docket.) In our

petition for rehearing, we complained that the majority opinion did not follow this reviewing standard and instead made de novo factual findings. (See Petition for Rehearing and Suggestion for Rehearing En Banc, pp.12-15.)

We attack Curry not simply because it is our first real opportunity to do so but because of the Ninth Circuit's refusal to accord state factfindings presumptive validity. While the Ninth Circuit exacted the price of federal review for the state court's alleged failure to insist upon its procedural rule, the federal court declined to pay the price imposed by Congress for federal review: deference to state factual findings. Application of section 2254(d) is the sine qua non of Curry review: a state appellate court opinion can only serve to forgive a procedural default if it is given the statutory presumption of correctness. Accordingly, we argue alternatively

to this Court that either Curry is wrong and a state court does not forgive a procedural default by rejecting a claim on the merits, or the state court findings are presumptively correct.

Contrary to defendant's contention, Jenkins v. Anderson, ___ U.S. ___, 65 L.Ed.2d 86, 92 n.1 (1980), does not control. Not only was procedural default raised and ruled upon below, but the issue here is not simply whether application of Wainwright v. Sykes bars federal review, but rather whether a state appellate decision acts as a waiver of the default thereby circumventing application of Sykes.

Indeed, if this Court determines that the State did not forfeit its right to claim procedural default, the litigants and the courts have already addressed the Sykes claim as to this issue, since "cause" and "prejudice" rests on the resolution of the merits of this claim and of defendant's

second contention below, that counsel was incompetent for failing to object to this identification evidence.[1/]

2. State Law Provides An Adequate And Independent Ground Barring Federal Review.

Defendant notes the existence of well-carved exceptions to the contemporaneous objection rule. Identification evidence is not among them. To the contrary, none of those exceptions apply here and settled state law upholds application of this rule to identification testimony. Compare, Ulster County Court v. Allen, 442 U.S. 140,

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1. Defendant argues here that counsel's failure to object to identification testimony was not tactically based, since "the only detail with which Almengor and Allen contradicted Childress is that Childress failed to place them at the scene. But there are a variety of other ways they [Allen and Almengor] could have been placed at the scene . . . ." (Brief for the Respondent, p.17 n.2.) Defendant now inverts the use he made of this inconsistency at trial where he argued that Allen and Almengor were at the scene but Childress, whose identification could not be impeached with pretrial procedures, was not. (See RT 1332-1338.)

150-151 (1979). Moreover, the rule only prohibits reversal following the failure to timely object, it does not stop a court from explaining to a defendant why a claim has no merit.

B. The Ninth Circuit Disregarded the State's Factual Findings and Made De Novo Findings Which Are Unsupported By the Record.

Defendant concedes that primary historical facts in this case are entitled to a presumption of correctness, but states that conclusions of federal law to be drawn from those facts is a matter of independent judgment by federal courts. Defendant asserts the Ninth Circuit was "faithful" to this principle, drawing its facts from the record, and not contradicting state court factual findings. (Brief for the Respondent, pp.18-20.)

The Ninth Circuit was as faithful to the record and the state court's factual findings as Henry VIII was to his wives. The only two

factors reviewed, probative of independent recollection, are laden with betrayal:

(1) Opportunity To View. The state court opinion notes that three inmate witnesses (Childress, Allen and Almengor) testified that they saw the stabbing take place and resolved that they had an opportunity to view the crime. (Petition for Certiorari, C-3, C-5.) The Ninth Circuit dismissed this finding with their own: " . . . the violence accompanying the incident and the threat presented by the knife would have, quite likely, diverted the witness' attention." (Petition for Certiorari, A-9.) The record does not contain one shred of evidence supporting this primary factual finding which is in complete contradiction with the state court's finding.

(2) Accuracy Of The Description. The state court found the descriptions by the witnesses were accurate (Petition for Certiorari, A-9), and by way of contradiction, the Ninth Circuit found they were not "detailed", by overlooking the detail contained in the record. (See Petition for Certiorari, pp.31-32.)

Similarly, the record supports the state court findings bearing on the issue of suggestibility, i.e., that there was no showing of influence by the investigating officers and that the photographic procedures were inherently fair.

We submit that the historical facts are either explicit or readily inferrable from the state's findings, but if we are wrong, then under Townsend v. Sain, 372 U.S. 293, 313 (1963), the Ninth Circuit was obligated to grant an evidentiary hearing, rather than substitute itself as the trier of fact.

II.

THE COURT OF APPEALS APPLIED AN ERRONEOUS STANDARD IN EVALUATING DEFENDANT'S CLAIM THAT HE WAS DENIED DUE PROCESS OF LAW BY THE USE OF PRETRIAL IDENTIFICATION PROCEDURES.

Our opening brief traced the development of this Court's cases regarding the due process implications of the admission of eyewitness identification evidence from the seminal case of Stovall v. Denno, 388 U.S. 293 (1967). There, in slightly less than a page of text, the Court defined a new due process concept and applied it to the case before it. Id. at 301-302. In subsequent cases the Court discussed at greater length the constitutional standard and its doctrinal basis. As the briefs demonstrate, the lower courts have not agreed on a uniform approach to the resolution of Stovall claims. In this argument we will state what we believe is the proper approach for a court faced with a claim that introduction of identification evidence would violate a defendant's

due process rights. We will then apply that standard to the facts of this case.

Once objection is made to introduction of evidence of a pretrial identification and/or an in-court identification on the ground that its admission would violate a defendant's due process rights, a court must initially determine whether the pretrial identification procedures were so impermissibly suggestive that they could give rise to a very substantial likelihood of mistaken identification. The focus of this inquiry is on the particular pretrial identification confrontation and the circumstances surrounding it. The pertenent question is whether, in the words of the Court in Foster v. California, 394 U.S. 440, 443 (1969), the identification procedures had the effect of telling the witness, "This is the man" so that it was all but inevitable that he would identify a particular suspect whether or not he was in fact "the man."

Therefore, in a case where a witness has been asked if he can select the photograph of a criminal from a group of photographs, the court may look not only to the photographs themselves but also to any conduct by law enforcement officers which would tend to make one or more of the photos stand out from the group. Similarly, the court may look to the circumstances of the crime to the extent that they have a bearing on the issue of suggestiveness. For example, if a photo spread contains nine photos of men wearing white shirts and one photo of a man wearing a distinctive red shirt, and the witness described the criminal by reference to such a distinctive red shirt, this circumstance would obviously be relevant to a determination of whether the photo spread suggested to the witness that the man in red shirt was the criminal. If, however, the witness described the criminal as wearing a blue shirt, this circumstance would have no

bearing on the issue of suggestiveness.

Should the court determine that the pretrial identification procedures were not impermissibly suggestive, the identification evidence may be presented to the trier of fact. The defendant retains the ability to persuade the trier of fact that it should be given little or no weight. He may cross-examine the prosecution witnesses. He may introduce evidence to contradict the prosecution evidence. He may argue that the evidence is worthless. Finally, he may be able to have the court specifically instruct the jury on the factors that affect eyewitness identification testimony, as they relate to reasonable doubt. See e.g., United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972); People v. Guzman, 47 Cal.App.3d 380, 121 Cal.Rptr. 69 (1975). Admission of this evidence, and reliance on it by the trier of fact to support a conviction, does not violate the constitution

unless the evidence, considered together with the other evidence in the case, would not permit a rational trier of fact to find the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979).

If, and only if, the court determines that the pretrial identification procedures were so impermissibly suggestive that they could give rise to a very substantial likelihood of mistaken identification does it become necessary to determine whether, on the facts of the particular case, they did in fact have this effect. The focus of this inquiry is on the reliability of the evidence. In making this latter determination the court examines the five factors articulated in Neil v. Biggers, 409 U.S. 188, 199-200 (1972) and Manson v. Brathwaite, 432 U.S. 98, 114 (1977) and any other circumstances bearing on the issue of reliability. The "corrupting effect" of the impermissibly suggestive

identification procedures on the reliability of the identification evidence is also considered at this juncture. Manson v. Brathwaite, supra at 114. If the identification evidence is so unreliable that there is a very substantial likelihood that it is mistaken it must be excluded. If not, it is treated just as any other evidence and its strength is subject to the jury's evaluation.

We believe that this approach is consistent with that expressed in the cases relied on in our opening brief. Though the cases sometimes express the proper "two-part approach" in an abbreviated manner, see e.g., United States v. Gidley, 527 F.2d 1345, 1350 (5th Cir. 1976), rehearing denied, 530 F.2d 976, cert. denied, 429 U.S. 841, it is clear that they focus first on the suggestive nature of the identification procedure. If it was impermissibly suggestive, the question then becomes whether the identification evidence is nonetheless

reliable.

Our discussion to this point has not mentioned the concept of "necessity" for the use of a particular identification procedure, since it has no bearing on the degree of suggestiveness present in a particular identification procedure or on the reliability of any identification evidence. Defendant's argument to the contrary appears to be based on confusion between the concepts of whether an identification procedure was "reliable" (in the sense that it would not be likely to produce a mistaken identification) and whether identification evidence was "reliable" (in the sense that it was not so untrustworthy that its admission would violate the defendant's due process right to a fair trial). Its result is to engraft onto a fact-oriented balancing process a form of the "per se" approach rejected in Manson. It also departs from the doctrinal moorings of Stovall and its progeny -- a concern with

the problems of eyewitness identification and a desire that unreliable eyewitness testimony not be admitted, Manson v. Brathwaite, supra at 111-112 -- into an uncharted sea of problems.

For example, defendant apparently cannot decide whether lack of "necessity" for use of photo identification procedures weighs against the admission of identification evidence in every case or only in cases where the record contains some evidence from which a court might "find" that in the particular case a lineup identification would have been more "reliable." (RB, pp.28-31.) The Ninth Circuit clearly opted for the former interpertation, finding a lack of "necessity" from the fact that defendant was a state prison inmate and was therefore available for a lineup. Mata v. Sumner, 611 F.2d 754, 757 (9th Cir. 1979). Defendant's argument that the record supports a "finding" that in this case a physical lineup was

required is flawed in several respects. For example, he argues that Almengor and Allen "complained of the age of the photos." (RB, p.28.) The citations supporting this statement refer to their comments after viewing the first set of photos on October 27, 1972. Thereafter, a second set of photos was shown to them. They apparently did not complain about them. Similarly, the statements allegedly supporting defendant's contention that Almengor testified that he "needed a physical line-up in order to make a positive identification" (RB, pp.29-30) were made before he viewed the pictures on October 30. His argument that the witness' recantation of their identification of Vargas from the photos showed the need for a lineup (RB, pp. 30-31) demonstrates instead that they were not forced into identifing the particular defendants and would instead be willing to admit making an incorrect identification.

Neither defendant nor the Ninth Circuit

define the concept of "necessity" with any precision. Assume a case where the defendant is in custody but the police do not have access to the services of a sufficient number of persons of similar appearance to construct what they believe to be a fair lineup. What efforts must they make to find similar persons? Are the reasonableness of their belief and the extent of their efforts to be examined in an evidentiary hearing? If, as defendant contends, "necessity" or its lack relates to the reliablity of evidence, must the jury be informed of, and make determinations regarding, these matters? Are due process protections dependent upon accidents such as whether an Eskimo suspected of committing a crime was arrested in Anchorage, where a lineup consisting solely of Eskimos could presumably be arranged without much difficulty, or in Miami Beach? Would the concept of "necessity" require the prosecution to justify why a five man

lineup was used instead of a six man lineup? Questions such as these demonstrate not only that recognition of a concept of "necessity" would pose additional practical problems for courts and juries, but also that "necessity" simply has nothing to do with either the suggestiveness of a particular pretrial identification procedure or the reliability of particular identification evidence.

We believe that application of the appropriate constitutional standard compels a conclusion that, though the identification proceedings in this case may have fallen short of the ideal in some respects, they were not impermissibly suggestive.

It should be noted initially that the witnesses were shown a large number of different photographs before they selected the defendants. Almengor saw an unspecified number of loose mug shots, as well as several hundred other pictures of inmates on October 19. (RT 398, 400, 422.) On October 27, he

and Allen were shown a group of 24 photographs (People's Exhibit 23) containing photographs of the defendants. (J.A., pp.96-98, 104.) On October 30, they were shown a substantially different group of 15 photographs containing different photographs of the defendants (People's Exhibit 24). (J.A., pp.100-103, 105-107.)

Defendant contends that this procedure was impermissibly suggestive in five particulars. (RB, pp.37-43.)

First, he claims that the identification procedure was "suggestive" because the witnesses believed that the photographs were inadequate to permit "reliable" identification and that a lineup would be required. (RB, p.37.) As was noted earlier, the witnesses believed only that People's Exhibit 23 was unsatisfactory because some of the pictures in it were outdated. They voiced no such complaint with respect to People's Exhibit 24. In any event, if defendant's claim

regarding this matter were accurate, it would seem to point away from a finding of impermissible suggestiveness. If the witnesses believed the photographs did not fairly represent any of the persons involved in the crime and that they could not make an identification from them, selection of the defendants' photographs would hardly have been "suggested."

Second, he contends that the prison officials told Almengor that his earlier "positive" identification of "Bogus Pete" Nunez was incorrect. (RB, p.38.) The very page of the transcript cited in support of this statement shows that Almengor's identification of "Bogus Pete" was anything but positive. (RT 711, see also RT 398.) It is true that, to the extent that "Bogus Pete" was removed from consideration in subsequent identification proceedings, those identification procedures may be considered "suggestive" in that they focused the witness'

attention away from "Bogus Pete" and onto the other persons depicted. However, the photographs of defendant and his codefendants still were not made to stand out from those of the other inmates. The range of choice remained large.

He also contends that the identification procedures were impermissibly suggestive because the photos of inmates Ramirez and Reymundo, whom Almengor had tentatively identified as being similar in appearance to the persons who attacked the victim, were removed. Again, removal of one or two photos from consideration would not have the effect of "singling out" the photographs of defendant and his codefendants from the remaining group of photographs.

Similarly, inclusion of photographs of the three defendants in both People's Exhibit 23 and People's Exhibit 24 would not suggest to the witnesses that they were supposed to select these photographs. As

is apparent from review of the exhibits, the photographs of each of the defendants are markedly different.[2/]

Finally, defendant's contention that the witnesses saw him and his codefendants being taken out of segregation in order to be re-photographed, and that this fact suggested to them that the prison officials believed them to be guilty, is contradicted by the witnesses' testimony that they did not know who was being taken out to be photographed again. (RT 444-445, 634, 645-646.)

Even if the photo identification procedures were impermissibly suggestive, they still did not "corrupt" the identifications to the extent that they should have been

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2. Judge Sneed, in his dissenting opinion in the Ninth Circuit, stated:

> "So different is the appellant's photograph used in the October 27 spread from that of October 30 that it is difficult to accept the fact the appellant appeared in the October 27 spread at all." (611 F.2d at 761.)

excluded from evidence on the ground that there was a very substantial likelihood that they were mistaken. The witnesses viewed defendant at close range, under good lighting conditions, for an amount of time sufficient to enable them to identify him. Almengor faced defendant directly on at least two occasions during the incident while neither of them were struggling. (J.A., pp.43-46.) Allen had seen defendant on numerous occasions before the incident, having previously lived in the same dorm with him. (J.A., p.79.) The witnesses' attention was fixed on defendant and his companions because they knew what was occurring almost immediately after the attack began. Their descriptions of defendant were reasonably detailed and apparently fairly accurate. Their identifications of him, both from People's Exhibit 24 and at trial, were positive. The time between the crime and the photo identification was not so substantial that it would

be likely to dim their memories appreciably.

As might be expected in a case of this nature, the three defendants, through their separate counsel, presented a spirited defense. Much of their effort was aimed at discrediting the identification evidence of the inmate witnesses. In the course of his brief in this Court, defendant has again attempted to discredit them. In doing so he has indiscriminately blended attacks on their character and credibility generally and attacks on the reliability of their identification testimony. Many of his statements can be explained because of the witnesses understandable (though not laudable) desire not to be "involved" in the case. Others perhaps cannot. The fact remains that strong indicia of the reliability of the identification evidence was presented. It was not corrupted to any significient degree by any suggestive influences inherent in the pretrial

identification procedures.

CONCLUSION

We respectfully submit that the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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